Supreme Court, U.S.
FILED

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CASE NO.

THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1994

LAWRENCE MOORE,

PLAINTIFF/PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; PAUL BLACKWOOD; THOMAS PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK, et al; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; J.J. BARRY; S.R. McCANN; RICHARD ROBBINS; ATKINSON MECHANICAL, INC.; FISCHBACH & MOORE, INC.,

DEFENDANTS/RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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98 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can a district court distort the facts, law, and issues and try an issue never sued for to conceal racketeering by a defense contractor and two unions (the International and Local) to evade federal debarment orders and defraud the federal government out of hundreds of millions of dollars via a scam which also breached their collective bargaining agreements ("CBAs")?

2. Can the union business manager (who was once the defense contractor's supervisor and is one of the racketeers) and another contractor's supervisor collude to reject/blacklist a member properly referred through the CBA job referral procedure in order to punish him for protected union activities (suing the union and officers, and running for union office)?

3. Should officers found by a jury to have breached their fiduciary duties by taking union funds for golden parachute pensions be ordered to return the stolen money and union funds used by in-house counsel in their losing defense and should attorney fees have been assessed against

Plaintiff because he asked the court, on behalf of members, to recuse in-house union counsel?

4. Can an IBEW policy restrict a member's right to run for delegate to an IBEW convention where the IBEW constitution is written and its president, VPs and executive board are elected?

5. Is dismissal of a Secretary of Labor's suit under LMRDA Title IV, where Plaintiff was never a party, *res judicata* over his separate suit for pre-election violations of LMRDA Title I rights during the election campaign?

6. Can Local 569 officers fine, suspend, assault, batter, and ostracize a member in the union newsletter during election campaigns, and refuse him equal rights to run for office, have his Bylaws proposals voted on, or to oppose CBA proposals, and can IBEW officers refuse to act on charges against Local 569 and IBEW officers, complaints on Local 569 elections, and appeals of Local Trial Boards (as the IBEW constitution requires) pending resolution of this lawsuit -- especially since IBEW officers held complaints, charges and appeals against Local 569 officers

in abeyance but implemented those suspensions, fines, and expulsion from the union against the member, and vetoed his Bylaws which were passed at meetings held only after his suspension from attending (showing that the permission to vote was purely pretextual).

7. Can union members who are not members of the Building Trades division of AFL-CIO be forced to pay an assessment for that entity as a condition of working under a CBA, and should declaratory relief prayers for equal space in Local 569's newsletters and from that Building Trades assessment have been given to the jury rather than decided *sua sponte* by the court?

8. Can an attorneys fees award on related claims be limited only to claims won and rates actually paid rather than current market rates, can a *pro se* Plaintiff recover expert witness fees as part of an attorneys fees award, can a party who never appeared at trial get fees for a witness, and can costs of copying Plaintiff's entire case file be indiscriminately awarded to the IBEW as ostensible "exemplication" costs?

LIST OF ALL PARTIES

Plaintiff Lawrence Moore, and Defendants Local 569 of the International Brotherhood of Electrical Workers; International Brotherhood of Electrical Workers; J.J. Barry; S.R. McCann; Richard Robbins; Paul Blackwood; Wayne Lovin; Jim Westfall; Tom Pridemore; Joe Heisler; Dick Smith; Terry Godshalk; George England; Richard White; Keith Widdop; Kris Hartnett; Don Withem; Steve Workman; Mike Reilly; John Simpson; Ray Altmeyer; Jim Brandon; Chancy Tyler; George Scott; Bud Hahn; Sharon Hahn; Tom Boulter; Bob Riel; Jim Aylsworth; Charles Wilder; Mike Degener; Chet Holm; John Manion; Wally Gauntt; Gary Degener; Ron Whitaker; Atkinson Mechanical Contractors, Inc.; Fischbach & Moore, Inc.

TABLE OF CONTENTS

	page
CITATIONS TO OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
TABLE OF STATUTES	1
STATEMENT OF THE CASE	2
ARGUMENT	37

QUESTION I (at page 37, *infra*):

This petition should be granted because the district court's decision to make breaches of a CBA by a corrupt defense contractor and two unions subject to *ex post facto*, exculpatory decisions of a joint union management committee made up of those conspirators conflicted with applicable decisions of the Supreme Court.

QUESTION II (at page 42):

This petition should be granted because the district court's refusal to permit breaches of contract and unfair labor practices by the two unions and Atkinson to be litigated conflicts with applicable decisions of this Court, and appeals court affirmation requires exercise of the Supreme Court's power of supervision.

QUESTION III (at page 49):

This petition should be heard because the district court's decision to deny recovery of union funds (taken by self-dealing officers for golden parachute pensions and for their losing defense against the union's breach of fiduciary duty action, and to instead award attorney fees

against the member who successfully sued those self-dealing officers on behalf of the union) conflicts with decisions of all other courts of appeals on the same issues, because the appeals court sanctioned the outrageous departures from the usual course of judicial proceedings by the lower court (thereby requiring exercise of this Court's power of supervision) and because these two matters also present questions of federal law which have not been, but should be, decided by the Supreme Court.

QUESTION IV (at page 55):

The district court's decision to grant the IBEW and Local 569 summary judgment on claims that the IBEW "policy" used to stop Plaintiff from running for IBEW convention delegate was reasonable conflicts with applicable decisions of this Court, the appeals court overstepped boundaries of accepted procedure to sanction departures from the usual course of judicial proceedings by the lower court, and by calling a policy a rule to dismiss for lack of subject matter jurisdiction, thereby solicited exercise

of the Supreme Court's supervision powers.

QUESTION V (at page 58):

The district court decision to grant Local 569 summary judgment on grounds a suit by the U.S. Secretary of Labor under LMRDA Title IV was *res judicata* on Plaintiff's separate suit for violations of his Title I rights conflicts with applicable decisions of the Supreme Court, and appeals court use of sophistry to approve the lower court's false record and deliberately make its own false record requires exercise of the Supreme Court's powers of supervision.

QUESTION VI (at page 61):

Lower court summary judgment to Local 569, the IBEW and their officers on his claims they violated LMRDA §§ 101 and 609 by disciplining him conflicts with Supreme Court decisions, and by approving the lower court's false record the appeals court requires exercise of the Supreme Court's powers of supervision for application of false standards.

QUESTION VII (at page 64):

The district court's limitation of relief

from an illegal assessment only to Plaintiff in the face of his breach of fiduciary claims, and its insistence on trying claims for declaratory relief despite Plaintiff's clear request for a jury trial conflicted with applicable decisions of the Supreme Court, and the appeals court's sanctioning of those actions (by begging the question of whether Plaintiff was entitled to a jury trial and disingenuously holding he was never "accorded class representative status") requires exercise of the supervision powers of the Supreme Court.

QUESTION VIII (at page 65):

Awarding attorneys fees only for related claims won, refusing to award at market rates or to award expert witness fees with attorneys fees, and awarding of witness fees to Fischbach (who was never a party at trial) and of copying costs to the IBEW conflict with applicable decision of the Supreme Court.

APPENDIX (of statutes) 66

A SUPPLEMENTAL APPENDIX ("S. Appx.") of orders is included in a separate booklet.

TABLE OF AUTHORITIES

page

Bakery & Confectionery Workers v. Ratner,
335 F.2d 691 (D.C. Cir. 1964) 54

Blum v. Stenson,
465 U.S. 886 (1984) 65

Brennan v. Chestnut,
973 F.2d 646 (8th Cir. 1992) 20

Butchers Union, Local 498 v. S.D.C. Investments Inc.,
631 F.Supp. 1001 (E.D.Cal. 1986) 20

Breininger v. Sheetmetal Workers Int'l Ass'n Local Union No. 6,
___ U.S. ____, 110 S.Ct. 424,
107 L.Ed.2d 388 (1989) 42, 62

California v. Sierra Club,
451 U.S. 287, 101 S.Ct. 1775,
68 L.Ed.2d 101 (1981) 64

Checker Taxi Co.,
131 NLRB 611 (1961) 44

Cotter v. Owen,
753 F.2d 223 (2nd Cr. 1985) 58

Czosek v. O'Mara,
397 U.S. 25, 90 S.Ct. 770,
25 L.Ed.2d 21 (1970) 39

Del Costello v. Int'l Broth. of Teamsters,
462 U.S. 151, 103 S.Ct. 2281,
76 L.Ed.2d (1983) 39

Donovan v. Daugherty,
550 F.Supp. 390 (D.C. Ala. 1982) 17

Doyle v. Brock,
821 F.2d 778 (D.C. Cir. 1987) 56

Dunlop v. Bachowski,
95 S.Ct. 1851 (1975) 61

Falstaff Brewing Corp.,
128 NLRB 294 (1960) 44

Food Fair Stores, Inc.,
131 NLRB 756 (1961) 44

Glover v. St. Louis-S.F. Ry.,
393 U.S. 324, 89 S.Ct. 548 (1969) 37

Gilbert v. Hoisting and Portable Engineers,
Local 701, 384 P.2d 136 (1963),
cert. denied, 376 U.S. 963 (1964)
390 P.2d 320 (1964) 54

Highway Truck Drivers & Helpers, etc. v.
Cohen, 334 F.2d 378 (3rd Cir. 1964),
cert. denied, 379 U.S. 921 (1964) 53

Highway Truck Drivers v. Cohen,
220 F.Supp. 735 (E.D. Pa. 1963) 54

Hines v. Anchor Motor Freight,
424 U.S. 554, 96 S.Ct. 1048,
17 L.Ed.2d 842 (1967) 23, 30, 39

Holdeman v. Sheldon,
204 F.Supp. 890, *aff'd*,
311 F.2d 2 (2d Cir. 19__) 53

Hood v. Journeymen Barbers, etc.,
454 F.2d 1347 (7th Cir. 1972) 52

Intern'l Ass'n of Bridge, etc. v. Norris,
383 F.2d 735 (5th Cir. 19__) 54

International Ass'n of Machinists v. Street,
81 S.Ct. 1784 (1961) 64

Intern'l Typographical Union v. N.L.R.B.,
365 U.S. 705 (1961) 46

Kapau v. Yamamoto,
622 F.2d 449, 455 (9th Cir. 1980) 61

Kerr v. Shanks,
466 F.2d 1271 (9th Cir. 1972),
cert. denied, 412 U.S. 918 ..... 52, 53

Lehnert v. Ferris Faculty Ass'n,
111 S.Ct. 1950 (1991) 64

Local 357, Intern'l B'hood. of Teamsters v. N.L.R.B., 365 U.S. 651 (1961) 46

Local No. 82, Furniture & Piano Mov. v. Crowley, 467 U.S. 526, 104 S.Ct. 2557,
81 L.Ed.2d 457 (1984) 61

Local 60, United Brotherhood of Carpenters v. N.L.R.B.,
365 U.S. 651 (1961) 46

Local 3489, United Steelworkers v. Usery,
429 U.S. 305, 97 S.Ct. 611,
50 L.Ed.2d 502 (1977) 56

Los Angeles-Seattle Motor Express Inc,
121 NLRB 1629 (1958) 45

Missouri v. Jenkens,
109 S.Ct. 2463 (1989) 65

Moore v. Bechtel Power,
840 F.2d 634 (9th Cir. 1988) 4

Moore v. Local 569 of the IBEW,
989 F.2d 1534 (9th Cir. 1993) 4, 41

Morrisey v. Curran,
482 F.Supp. 31 (DC SDNY 1979),
aff'd, rev'd, and vacated in part on other grounds, 650 F.2d 1267 (2nd Cir. 1981) 52

Mountain Pacific Chapter of Associated General Contractors, Inc.,
119 NLRB 883 (1957) 45

Nachwalter v. Christie,
805 F.2d 956 (11th Cir. 1986) 17

Nassau and Suffolk Contractor' Ass'n,
123 NLRB 1393 (1959) 44

National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 69 S.Ct. 1173,
93 L.Ed. 1556 (1949) 50

New England Telephone and Telegraph Co. v. I.B.E.W., 384 F.Supp. 752 (D.C.Mass. 1974). 57

NLRB v. Boilermakers, Local No. 154,
253 NLRB 747 (1980) 47

N.L.R.B. v. Carpenters Local No. 35,
739 F.2d 479 (9th Cir. 1984), *cert. denied*,
105 S.Ct. 3477, 87 L.Ed.2d 613 48

N.L.R.B. v. Erie Resistor Corp.,
373 U.S. 221, 83 S.Ct. 1139,
10 L.Ed.2d 308 (1963) 57

NLRB v. Laborers Int'l Union, Local 300,
613 F.2d 203 (9th Cir. 1980) 49

N.L.R.B. v. Local 176, United Bro'hood of Carpenters and Joiners, 276 F.2d 583 45

N.L.R.B. v. News Syndicate Co.,
365 U.S. 695 (1961) 46

Northcross v. Board of Education of Memphis City Schools, 447 U.S. 911, 100 S.Ct. 2999,
64 L.Ed.2d 862 (1980) 65

Pacific Maritime Ass'n,
23 NLRB 559 (1959) 44

Parsons Electric and IBEW Local 292,
304 NLRB 115, 138 LRRM 1214 (1991) 48

Phillips v. Osborne,
403 F.2d 826 (9th Cir. 1968) 52

Pignotti v. Sheet Metal Workers' Intern'l Ass'n, 477 F.2d 825 (8th Cir. 1973), *cert. denied*, 414 U.S. 1067 52

Puerto Rico Dry Dock & Marine Terminals,
123 NLRB 1298 (1959) 44

Radio Officers' Union, AFL v. N.L.R.B.,
347 U.S. 17 (1954) 43

Retail Clerks Local 648 v. Retail Clerks Intl. Ass'n,
299 F.Supp. 1012 (D.C.DC 1969) 57

Ross v. Int'l Broth. of Elect. Workers,
513 F.2d 840 (9th Cir. 1975) 61

Southern Electrical & Pipefitting Inc,
131 NLRB 44 (1961) 44

Steele v. Louisville & Nashville R.R.,
323 U.S. 192, 65 S.Ct. 226,
89 L.Ed. (1944) 42

Stelling v. Int'l Broth. of Elec. Workers,
587 F.2d 1379, (9th Cir. 1978) 3, 27

Thornberry v. Delta Airlines, Inc.,
676 F.2d 1240 (9th Cir. 1982) 65

Tucker v. Shaw,
378 F.2d 304 (2d Cir. 1967) 53

United Association of Journeymen & Apprentices (Brown-Olds),
115 NLRB 594 (1956) 45

United Bhd. of Carpenters v. Brown,
343 F.2d 872 (10th Cir. 1965) 54

United Parcel Service, Inc. v. Mitchell,
451 U.S. 56 (1981) 39

Vaca v. Sipes,
386 U.S. 171, 87 S.Ct. 903,
17 L.Ed.2d 842 (1967) 30, 38, 39, 47

Wallace Corp.,
50 NLRB 138, *enf'd.*, 323 U.S. 248 (1944) .. 43

Wirtz v. Hotel Employees,
391 U.S. 492, 88 S.Ct. 1743,
20 L.Ed.2d 763 (1968) 56

Wooddell v. IBEW Local No. 71,
___ U.S. ___, 112 S.Ct. 494,
116 L.Ed.2d 419 (1991) 38, 55

Yablonski v. United Mine Workers,
488 F.2d 1175 (D.C. Cir. 1971),
cert. denied, 406 U.S. 906 53

CITATIONS TO OPINIONS BELOW.

There were no opinions published below.

STATEMENT OF JURISDICTION.

The memorandum of the court of appeals was filed on June 10, 1994.

Jurisdiction was proper in the district court under 18 U.S.C. § 3231, 28 U.S.C. 1331. Appellate jurisdiction was proper under 28 U.S.C. § 1291. This Court has jurisdiction to hear this matter pursuant to Rule 10 of the Supreme Court Rules.

TABLE OF STATUTES.

page

National Labor Relations Act
§ 8 (29 U.S.C. 158) 43

Labor Management Relations Act
§ 301 (29 U.S.C. 185) 12, 43

Labor Management Reporting and Disclosure
Act § 2 (29 U.S.C. 401) .....

Labor Management Reporting and Disclosure
Act § 101 (29 U.S.C. 411) ... 7, 12, 17, 58-62

Labor Management Reporting and Disclosure
Act § 501 (29 U.S.C. 501) 7, 12, 15, 17

Labor Management Reporting and Disclosure
Act § 609 (29 U.S.C. 529) 7, 61, 62

STATEMENT OF THE CASE.

This case was filed on February 9, 1987, but actually started in 1985-86 after Fischbach & Moore, Inc., the country's largest electrical defense contractor, was convicted in District Courts in Georgia, Pennsylvania, Tennessee, and Maryland for anti-trust violations, bid-rigging income tax evasion and mail fraud, was debarred from federal jobs and began to collude with the IBEW and Local 569 to evade those debarments.

Plaintiff Moore did not become aware of Fischbach's full role until the eve of trial, when he finally got some answers to discovery requests filed years earlier. Fischbach was protected by the District and Circuit Courts.

This is one of a continuing series of cases filed by Plaintiff Lawrence Moore in attempts to stop wrongful terminations and blacklisting from employment, assaults, batteries, fines, suspensions and expulsion from Local 569. He has been unsuccessful despite winning jury trials in 1989 and 1991, and the jury verdict awards have been given back to defendants.

In 1982 Mr. Moore was a union electrician earning between $30-40,000.00 per year, but not active in union politics. After the Building Trades Division of AFL-CIO ("Building Trades"), the International Brotherhood of Electrical Workers ("IBEW") and Local 569 implemented a "sweetheart" agreement at San Onofre Nuclear Power Generating Station Moore was elected a delegate to the IBEW's 1982 convention on a platform of checking and balancing the IBEW's pervasive control over its Local Unions.1/

Moore was fired (the only time in 24 years) for refusing to enter a radioactive area of San Onofre, the contract grievance procedure failed and he sued all parties over obvious collusion

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1/. Such sweetheart contracts are erroneously called collective bargaining agreements ("CBA") but union members have no choice or vote. The sweetheart CBA eliminated radiation protections in Local 569's voted-on CBA (San Diego already had a budding "fusion" industry) and Local 569 then made job requests to San Onofre mandatory. Arbitrary imposition of such CBAs was approved in *Stelling v. Intern. Broth. of Elec. Workers, etc.*, 587 F.2d 1379 (9th Cir. 1978). The CBA (sic) also established a "grievance procedure," which was ultimately controlled by the Building Trades Division, but it was impossible to even discover who was the bargaining representative.

and bad faith during the grievance processing. The district and circuit courts dismissed for defective service, this Court reversed, and the Ninth Circuit dismissed the suit again on the merits without permitting any discovery. *Moore v. Bechtel Power*, 840 F.2d 634 (9th Cir. 1988). He never worked regularly in San Diego again.

At a union meeting in May, 1984 Moore was shouted down, assaulted, battered and prevented from speaking against a dues increase, by Local 569 officers Heisler, Flowers, Lovin, Westfall, Blackwood and Pridemore. Subsequently Flowers lived in the union hall, was paid "consulting fees" by Blackwood and Westfall, and assaulted Moore with guns and battered him several times.

In 1985 Moore filed suit against Local 569 and IBEW officers who blacklisted him, violated his rights, and assaulted and battered him, and against Local 569 officers and Baker Electric, Inc., whose owner was the president of the San Diego Nat'l Electrical Contractors Association ("NECA"), for refusing to accept his CBA job referral without cause. *Moore v. Local 569*,

989 F.2d 1534 (9th Cir. 1993), *on Petition for Writ of Certiorari*, Case No. 93-1026.

As with Bechtel, Baker Electric escaped via decisions of a joint union-management committee which NECA, Local 569 and lower courts insisted was "arbitration" and *res judicata* on causes of action for breach of contract and union duty of fair representation. In the Ninth Circuit such phony arbitration, like sweetheart agreements, has become institutionalized. See *infra*.2/

Moore also worked for L & B Electric, Inc. (owned by a NECA treasurer) for a month before discovering he was exposed to asbestos (L & B was renovating a chain of department stores and asbestos control cost $350-450,000.00 for each of three jobs in Los Angeles). He was laid off

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2/. NECA's manager (hired by Baker) and Local 569 officer Hartnett (Baker's foreman who was a defendant there and here) jointly appointed the third member of that committee, but Moore had no success pointing out their obvious bias, that the CBA limited them to overseeing Local 569's administration of the CBA job referral procedure, that they had no jurisdiction over employers, or that Baker Electric was never a party either before the committee or to Moore's suit to vacate the committee's decision which exceeded its jurisdiction and cleared Baker.

after complaining about lack of control in San Diego, but Cal-Osha did cite L & B for exposing its employees. Local 569 officers pretended to deadlock with NECA officers on a grievance, but at the San Diego joint Local 569-NECA committee the IBEW, despite no CBA status, intervened and the grievance was sent to another union-NECA committee (CIR) which then found for L & B.3/

Moore filed this suit on February 9, 1987, and sued Fischbach & Moore, Inc. ("Fischbach"), and IBEW and Local 569 defendants for breaching a CBA by conspiring to evade Federal debarments by transfers of workers to Fischbach's "puppet" entities and doing business as usual.

He sued Atkinson Mechanical Contractors Inc ("Atkinson") and Local 569 officers after they blacklisted him and rejected his acceptance of Atkinson's CBA request for an electrician.

3/. Moore uncovered a secret letter to a second committee (CIR) from IBEW agent Robbins, urging the CIR to find for "our good union contractor" and castigating Moore. Robbins also admitted interfering in the first hearing, but it didn't cut any ice with the lower courts. Dismissal was affirmed in an unpublished opinion.

He also sued Union Defendants for violation of his LMRDA Title I (29 USC 411) rights during an election and several phony Trial Boards, of violating fiduciary duties under LMRDA § 501 by stealing union funds, and for effecting "CBAs" (sic) arbitrarily, and for § 629 discipline.

Although he won a jury trial on most issues the district court had its own agenda on others and ensured he did not win some, that some were never presented to the jury, and that the jury decisions were *de facto* vacated on others.

In May, 1986 Fischbach laid Moore off to hide transfers of its employees (including the son of Local 569 business manager Smith) to a "puppet company," Corbin Dykes Co.4/

In May, 1986 Moore was nominated for both IBEW convention delegate and as a candidate for business manager of Local 569 against incumbent

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4/. Local 569 can be the only CBA source of electricians, but after Corbin Dykes Co. signed the CBA on April 30, 1985 Fischbach transferred its employees and equipment to Corbin Dykes Co. as part of its plan to avoid Federal debarment. Fischbach and Local 569 business managers Smith Blackwood, and Pridemore permitted transferring until Corbin Dykes was also debarred in 1988.

Paul Blackwood and Fischbach supervisor Smith, who eventually won (Fischbach needed compliant business managers). Moore was not permitted to run for delegate by the election judge (Smith's daughter-in-law). That election was validated by the IBEW, but the U.S. Dept of Labor (DOL) investigated and demanded a new election, and business manager Smith refused. The DOL sued to force a new election in December, 1986.

In September, 1986 Moore opposed increase of an assessment levied on members for the Building Trades Division of AFL-CIO because of an illegal vote. The IBEW ordered a second vote in December, 1986. It was also illegal.

Moore's hiring hall referral to Atkinson in October, 1986 was rejected despite not working for it before and not knowing supervisor Billy Wells, who admitted rejecting him for protected "union-connected" activities.5/

5/. Atkinson, an out of town contractor, hired Wells locally on Smith's recommendation. Wells had been one of the first Fischbach transferees to Corbin Dykes Co., and in a deposition Wells acknowledged his sympathetic relationship with Smith and the other Defendants in this case.

Five minutes after Moore accepted the job request for an electrician, Smith's assistant Godshalk telephoned Local 569 agent White 125 miles away and told him Moore was on his way to the job site near White's office. As he drove to Atkinson's job site, Smith, White and Wells had several telephone conversations, Wells said he would reject Moore, and Smith approved.6/

Moore returned to Local 569 and filed a grievance on the rejection with Godshalk, who threw Moore a candy saying, "Here's a kiss to go with the kiss-off," and Smith dismissed the grievance. Moore complained to the referral procedure Appeals Committee. Smith dismissed that because Atkinson refused to participate.

From August to October, 1986 a CBA proposal (covering the rest of Local 569's jurisdiction) with NECA was rejected repeatedly by Local 569 members, but was brought back repeatedly until it passed at a poorly attended meeting. Moore

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6/. After Local 569 produced partial telephone records three times, Moore subpoenaed originals from the telephone company showing their calls.

had opposed that CBA proposal. In November he was assaulted by an electrician he didn't know as business manager Smith looked on.

Internal Union charges were pressed against Moore for assaulting the assaulter, Moore was fined $500.00 and suspended from union meetings by a Local 569 Trial Board made up of Altmeyer, England, Reilly, Withem, Hartnett, Simpson and Workman. Several witnesses testified Moore was assaulted, and only Smith backed the assaulter.

Moore filed this suit on February 9, 1987. In March, 1987 Gary Degener threatened to kill Moore in the union hiring hall while assistant business manager Godshalk watched.7/ In April, 1987 Smith removed Moore from the hiring hall out of work list. The Trial Board decision was set aside on July 6, 1987 because of bias, and the court granted Moore a TRO against the Local

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7/. Smith and Godshalk contacted IBEW local unions where Moore had worked in California and Nevada since 1982, to blacklist him (they swore they only "warned" Locals about him). Degener followed Moore to those Locals to see if he was on out-of-work lists. He also drove alongside Moore on a freeway and pointed a gun at Moore's head, but the driver braked and swerved.

Defendants fining and suspending him.

During 1987 Smith and Local 569 president England tried four times to have CBA proposals ratified by members, but were rejected because, as in 1986, they reduced wages by a third. In October, 1987 Smith, Hartnett, and England also read new Bylaws proposals to raise union dues, and Moore read proposals to lower dues and for a mandatory procedure for submitting such CBA proposals to members. Moore's proposals were ruled out of order (without a vote) at meetings on orders from IBEW vice-president McCann.

In November, 1987 Smith and England signed the proposed CBA without members' approval. In November, 1987 a Trial Board presided over by Smith's appointed agent White (who was involved in Atkinson's rejection) and made up of Moore's political adversaries Brandon, Scott, Boulter, Tyler, Hahn and Hahn fined and suspended Moore exactly the same as before on the same charges.

The court denied Moore a second TRO saying they would just keep trying and his remedy was to get to trial. Altmeyer ordered Moore out of

a March 9, 1988 Union meeting (England ordered him out of meetings after the first decision), and another one year suspension began.

In 1988 Smith and Altmeyer (appointed as president after England resigned) failed three times to get the CBA they had imposed in 1987 approved by the members. In August, 1988 IBEW president Barry forced a new Bylaw on Local 569 (no vote) providing for a one-time-mail-in-vote on the 1987 CBA. All the ballots and envelopes were sequentially numbered, ninety-one ballots were disqualified. The CBA passed by 7 votes.

In August, 1988 IBEW president Barry also ordered a vote on Moore's Bylaws proposals and Moore also wrote a Bylaw providing for recall of officers.8/ Despite Moore's suspension the procedure for submission of CBA proposals, for recalling officers, and two others passed, but

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8/. Local 569 and IBEW officers were prompted to permit votes by Moore's motions to amend the complaint to add LMRDA Titles I and V claims (violations of rights and breach of fiduciary duty), and LMRA § 301 (breach of the Local 569 Bylaws and IBEW constitution contracts) against them for activities related to Trial Boards, CBA implementations and his Bylaw proposals.

Barry then vetoed them all. In February, 1989 Local 569 stipulated to let the DOL supervise the regular election in June, 1989 and the DOL withdrew its lawsuit on the 1986 election. In December, 1989 Moore won the trial in the case he filed in 1985. Business manager Pridemore demoted Moore to out-of-work list Group Two, and he, Blackwood and Westfall filed charges against Moore for suing them and winning.

In March, 1990 a Trial Board presided over by Local 569 treasurer Riel, Aylsworth, Wilder, Manion, Mike Degener (Gary's brother), Holm and Gauntt expelled Moore from the Union on charges he sued Pridemore, Westfall and Blackwood.9/

Moore filed charges against Local officers

9/. Trial Board officers were again hand-picked enemies of Moore. Riel was a supervisor for Dynalectric, Inc., convicted with Fischbach & Moore, Inc. in Georgia district court for bid-rigging, mail fraud and anti-trust violations, Manion and Degener were foremen for Westfall's boss at Local 569's Apprentice Training Trust (who, with co-trustees Blackwood, Pridemore, England and NECA's and Dynalectric's managers, had appointed Westfall as Trust Director), and the others were part of the small group which was regularly appointed to Local 569 Trusts or CBA negotiating committees.

with the IBEW vice president as required under the IBEW constitution for all their actions but in contrast to trial boards for charged members there is no provision for a hearing on charges against Local officers, and IBEW officers can't even be charged. IBEW VP McCann held charges against Local 569 officers in abeyance until this suit was resolved, based on IBEW "policy" but in violation of the IBEW constitution.

The same suit prompted no "abeyance policy" for Trial Board decisions on Moore (limited to an appeal to the IBEW) and McCann affirmed all penalties. Moore appealed affirmation of Trial Boards and the 1986 election to IBEW president Barry, and charged Barry, McCann and Robbins with interfering in Local 569's Bylaws and 1988 CBA proposals voting. Barry did not act.

Moore added a cause of action for breach of fiduciary duty by Local 569 officers' taking of union funds to buy themselves inflated pensions and after satisfying Ninth Circuit "good cause" criteria for filing such actions, then moved to recuse in-house union counsel from representing

the officers on that claim. The court denied recusal and ordered him to pay in-house counsel $6,846.75 costs for bringing the motion.10/

The jury found officers breached fiduciary duties and Moore asked the court to order that money taken for pensions and attorney fees used for their losing defense be repaid, that those pensions be modified, and that a $6,846.75 bond be returned to him, but the court refused.

The Appeal Court repeated officers' losing defense (that they were entitled to 48 credits per week and could take even larger credits). They produced no evidence of hours worked.

The circuit court also erroneously held the district court acted within its "discretion" by declining to order Defendants to reimburse the Local for money taken for inflated pensions and

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10/. The circuit court also wouldn't order the $6,846.75 returned to Moore because he "had not demonstrated a reasonable likelihood of success on his § 501 claim" (he won the claim on behalf of members), and said he hadn't made a "timely" request (not true). There is no "likelihood of success" test for filing LMRDA § 501 claims or recusal motions, and the court admitted at oral argument the money should be returned when and if it affirmed jury verdicts (S. Appx. at 120).

for their losing defense, thereby overruling the jury and ignoring Moore's prayer for relief on behalf of the victims -- union members.11/

Moore showed good cause and was permitted to amend to add fiduciary duty breaches against IBEW officers for violating Local 569's Bylaws and the IBEW constitution to implement CBAs in the face of repeated membership rejections.

11/. The Pension Trust was created by the CBA, which stated one pension credit (and one Health Trust credit) is paid for each CBA hour worked. Union officers were not even covered by the CBA or entitled to receive 40 credit-hours per week where the salaried rate favored them over other hourly paid electricians. *Donovan v. Daugherty*, 550 F.Supp. 390 (D.C. Ala. 1982). *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986) (a plan must be maintained pursuant to the written instruments). Electricians average 1500 credits per year, but officers took 2500 per yr minimum and also sometimes took 208 credits for 2 weeks (80 was normal) and 430 hours for 7 days. But they concurrently paid only 1500 credits per yr into the Health Trust because benefits did not increase if they paid even 40 credits per week.

Fischbach paid Smith while he campaigned for business manager and gave him a week of extra Pension Trust credits monthly, violating a one-credit-for-one-hour-worked CBA limitation, and Fischbach gave him hundreds of pension credits as a gift on becoming business manager, other Union officers regularly inflated their Pension credits with Union funds, and Smith's son and daughter-in-law transferred from Fischbach to Corbin Dykes Co. without ever going through the CBA out-of-work list.

But the court then dismissed IBEW president Barry from § 501 fiduciary duty claims saying failure to act on appeals of the Trial Boards, vetoing of properly passed bylaws (including a procedure for ratifying CBAs and for recalling Local Union officers), and shoving the tainted one-time-mail-in-vote down the members' throats only violated Moore's LMRDA § 101 rights, and that his dismissal from § 501 was on behalf of Defendants McCann and Robbins also.

After Moore filed notice of default against Barry, and despite its holding that Moore had an LMRDA Title One claim against him, the court refused to enter default, and held it had no *in personam* jurisdiction over Barry and dismissed him from the action "globally" (those ludicrous obfuscations, affirmed on appeal, allowing the escape of a union president beg for exercise of the Court's supervision power (S. Appx., 55)).

Plaintiff had no success getting discovery. A motion to compel discovery from Atkinson was never acted on. On October 30, 1989 Atkinson moved for summary judgment, and was supported

by a declaration of Smith. Moore's opposition included an FRCP 56(f) Declaration, but it was dismissed on April 16, 1990 (S. Appx., at 3).

Moore filed three motions to compel against Fischbach, and one was finally granted but had no effect. After a second order to comply with discovery requests, it moved for a protective order and stay of discovery (both were denied) and still refused to produce responses.

Moore asked the court to find Fischbach and its attorneys in contempt for still refusing to respond, and after six months of supplemental motions and declarations Fischbach and counsel were ordered to show cause why they should not be found in contempt.

Moore filed more supplemental papers to his contempt motion, showing the misrepresentations by Fischbach, and after another two months some documents showing a national scheme by the IBEW and Fischbach to evade Federal debarment orders by transfers of personnel to other corporations were produced. Six days before trial Fischbach finally produced documents showing transfers to

Corbin Dykes Co. from July, 1985 to August, 1988 in San Diego, and to Dynalectric, Inc.12/

Moore immediately moved to amend his DFR claim against the Unions, to add Dynalectric, Inc. as a defendant and for class certification on behalf of the other electricians wronged by Fischbach's transfers, but was denied. Claims against Fischbach for inflating Smith's Pension account, interference with the Union election,

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12/. Corbin Dykes Co., an Arizona corporation, is owned by Fischbach & Moore Inc., a New York corporation owned by Fischbach Inc., a New York holding company which controls many entities, including Natkin Group Inc. which had supported Blackwood for business manager in 1986, while Fischbach & Moore Inc. supported its supervisor Smith. The payroll for San Diego electricians transferred to Corbin Dykes was $1,776,191.27.

The Federal government finally got wise and debarred Corbin Dykes Co and 14 other companies serving the same Fischbach "puppet" role around the country. The 14 other entities, which were in large Federal markets nationally, were never identified to Moore as transferees by Fischbach despite specific, years old requests, but the IBEW claimed 10,000 electricians were involved. Some idea of the amounts of money involved can be gotten from the fact that Dynalectric Inc. and its parent Dynalectron (much, much smaller than the Fischbach group) earned $640.3 million the year prior to its debarment for indictments (on conspiring with Fischbach to rig bids on an EPA waste water treatment plant in Georgia) and a third came from the Dept. of Defense alone.

wrongful firing of Moore, blacklisting, and for intentional infliction of emotional distress were included and were also denied.

He was also denied leave to add a claim for conspiracy against both Fischbach and the union Defendants, but the court said it would revisit that request during directed verdict motions. Union members are foreclosed from racketeering suits available to other citizens because they bargain collectively (Defendants and the Ninth Circuit have made collective concepts a farce). Labor Management Relations Act "pre-emption" applies also to such RICO claims. *Brennan v. Chestnut*, 973 F.2d 646 (8th Cir. 1992) citing *Butchers Union, Local 498 v. S.D.C. Investments Inc.*, 631 F.Supp. 1001 (E.D.Cal. 1986).

Moore also moved to compel discovery from Local 569 and the IBEW, and moved to find them in contempt for destroying the absentee ballot requests and ballots from the 1986 election and the tainted ballots from the August, 1988 CBA ratification mail-in vote pursuant to Barry's "Bylaw." They also continued to stonewall.

Moore also moved for contempt against IBEW and Local 569 attorneys for interfering with a witness who told Moore that officers, including Pridemore, announced at a meeting that he was expelled from the Union before his expulsion. Contempt matters were always referred to the magistrate and never acted on. Discovery was never completed against any parties.

Moore sued Fischbach for breaching the CBA by acting as a source of electricians for other contractors, and Union Defendants for breaching the DFR to administrate the CBA-created hiring hall fairly. On February 20, 1990 Fischbach's summary judgment motions on grounds transfers were permitted because it and Corbin Dykes Co. were the same corporation were denied.13/

The court called Corbin Dykes Co. a "puppet company" after Fischbach and the Unions offered the need to conspire to evade debarment orders

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13/. They were held to be separate corporations but a year later it became an issue of fact. Smith and Pridemore had submitted declarations supporting Fischbach, and Pridemore and NECA's manager supported Fischbach's later motions.

as their justification for violating the CBA by the transfers of employees, expressed amazement at their audacity in admitting it to a Federal judge, but finally said he didn't care because the conspiracy "is not before me" (but it was).

The court said it couldn't grant Fischbach summary judgment because they had "urinated in their nest" by having Corbin Dykes separately sign Local 569's CBA (scolding counsel that it was bad advice and unnecessary to effect their ends), and suggested the parties should take it to the CBA's grievance committees. Local 569's motion for summary judgment was also denied.

Months later Fischbach, Local 569 and NECA met in *ex post facto* "grievance" committees and approved illegal transfers, and brought another motion for summary judgment on grounds that the approval was *res judicata* on Moore's breach of contract claims in district court (Local 569 wrote Moore a "committee" would reconsider that issue, but Moore wrote back and refused to have anything to do with their "low-life dealings").

No grievance existed, committee members

were hostile to Moore, he was not told about a later meeting which had okayed those transfers (on grounds Fischbach & Moore, Inc. and Corbin Dykes Co. were only one corporation, ignoring the district court's contrary decision a year earlier), and that motion was also denied.14/

Fischbach produced documents implicating IBEW president Barry in that nation-wide scheme to evade Federal debarments (Barry had appeared on Fischbach's behalf at the debarment hearings and a Fischbach officer swore in a declaration that the IBEW prevailed on its locals to permit transfers. Leave was denied to add Barry, and the IBEW was also eventually dismissed.

14/. S. Appx., at p. 5. No grievance was ever submitted to those joint committees convened by Local 569, and since business managers Smith and Pridemore had admitted breaching the DFR to administer the CBA referral procedure fairly by aiding Fischbach's attempts to evade debarment, Local 569's use of the grievance procedure on behalf of Fischbach plumbed new depths of DFR breach. The court cited *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) to hold that Fischbach was not protected by joint committees from Moore litigating the breaches of contract. As usual, the grievance committees were stocked with Pridemore, Defendants (Moore had judgments against one) and NECA and Dynalectric managers.

In orders filed on May 2, June 5 and July 16, 1994 in response to motions by Defendants, when Moore could oppose and file declarations, most causes of action survived, but Fischbach's trial was bifurcated (Moore objected colluding parties must be tried together) (see orders at S. Appx., at pp. 23-51, 52-60, and 61-73).15/

The court sua sponte questioned Moore's standing and Fischbach moved again to dismiss, supported by Local 569 and by Declarations of Pridemore and others fraudulently asserting only four electricians had been transferred. Fischbach made later motions to dismiss and reconsider denials of summary judgment, and they were also denied.16/

But the first day of trial the court said

15/. Bifurcation was a pretextual device to exclude evidence of the conspiracy on grounds that "motive is not an element of breach of contract," pre-empting Defendants' bad faith.

16/. Fischbach motions included declarations by Pridemore (chairman of one joint committee and supposed Moore advocate at another), NECA's manager (secretary of the first committee who appointed management members), and by Barry's appointed secretary of another committee, who appointed the Union members).

it would hear motions in limine. During three days of sophistry all evidence of transfers and debarments was excluded, Local 569 was switched to be tried first, Moore was told he must prove Local 569 breached its DFR in the *ex post facto* grievance hearing before the breach of contract against Fischbach would be tried (causing Local 569 to exclaim, "the recipe gets better every time we re-cook it") over vehement objections by Moore, and all denials of Union motions for summary judgment were revisited.

The court said, "I'm not letting [the IBEW] out" of the Fischbach claim, but let it out of the claim for implementing the Atkinson "CBA," negotiated by the Building Trades and the IBEW, and signed by both Local 569's business manager and the IBEW president without a vote by Local 569 members, because of no "tangible evidence" (despite IBEW agent Robbins's written reports).

Claims against the IBEW and Local 569 under LMRDA Title I for preventing Moore from running for convention delegate were dismissed as "far short of the anti-democratic showing" necessary

to create an issue of fact as to reasonableness of the *policy* which prevented him from running. (The appeal court held Moore had challenged the rules governing eligibility, but he challenged the IBEW policy used to stop his candidacy on the pretext he also run for business manager (business managers are appointed delegates)).

The IBEW was held not liable for McCann's affirming and Barry not acting on the Local 569 Trial Boards and elections, or McCann stopping voting on and Barry vetoing proper Bylaws for approving CBAs and recalling officers, and the court held officers were not liable for damages for abusing Moore in Local 569's newsletter.

The court held Moore could not recover any damages for members who paid illegal increases in a Local assessment for the Building Trades, but he was granted summary judgment for himself and found to have no damages, even though that illegal increase is still in effect.

The court *sua sponte* held denial of summary judgment to the DOL in a suit under LMRDA Title IV to set aside the election was *res judicata*

on Moore's Title I claims for violations of his pre-election rights during two campaigns.

The IBEW's request to reconsider denial of summary judgment [for failure to act on Moore's charges that Local 569 officers interfered with complaints to the hiring hall Appeals Committee on the Atkinson rejection] was granted, and the court said Atkinson breached the CBA by refusal to participate in hearings, another indication summary judgment to Atkinson was premature.17/

Moore wasn't permitted to speak during that three day ambush (he made an offer of proof on evidence of debarments but was not permitted to describe it on the record). When Fischbach and the Union interrupted his opening statement ten

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17/. IBEW "policy" is to not act on charges against Local officers for abusing the hiring hall because the Local is members' exclusive bargaining agent, but the court found the "CBA" with Atkinson was "negotiated" by the Building Trades (S. Appx. at 26), undoubtably influenced by *Stelling v. IBEW Local 1547*, *supra*, p. 3 (it is not "patently unreasonable" for the IBEW to act as an "exclusive representative" without designation by bargaining unit members). But see *J.J. Case v. N.L.R.B.*, 321 U.S. 332 (1944).

The entire referral procedure is written by the IBEW and national NECA, and made mandatory in all IBEW Locals' CBAs by the IBEW.

times the court recessed the jury to warn Moore to keep his eye on the grievance hearing "ball" at trial. Moore protested breaches of the CBA referral procedure by Fischbach and Local 569 should be before the jury. The court ordered him to litigate the grievance committee issue, interrupted proof of management members' bias (including Dynalectric's and NECA's managers), saying his "neat theory" was irrelevant because they had "institutional bias," and only union members had a duty to be fair, and it ordered him to show only union committee members' bias.

Fischbach wasn't a party at the phony trial but made opening arguments, endless objections, did cross and direct examination of witnesses, interlocutory motions and closing arguments. Both Local 569 and Fischbach screwed with the evidence and the main exhibit was not accepted or given to the jury until after its decision.

The court followed up Fischbach's opening statement with a prejudicial instruction to the jury to accept "arbitration" as "legitimate and proper," and "Believe me, its a good idea," and

twice said if they found against Moore "we" can put it behind "us," and despite admitting (out of the jury's presence) "many gross failures in handling of the case" by the Unions, and that they and Fischbach went to the joint committees to "take the issue out of the district court," the jury was urged if it found against Moore "this part of the case is over and we'll go on to something else."18/

It then dismissed Fischbach because Local 569 waived any challenge by "acquiescence in F & M's transfer policy, prior to the raising of any complaint by plaintiff" (S. Appx., at 76), and held Unions must pay all damage if the jury found the joint committees tainted, whereupon IBEW counsel then shouted "I've always felt the grievance issue is a total red herring!" (sic). Fischbach was brought back, dismissed again, and awarded witness fees for a Union witness.

18/. At sidebar the court said comments on Moore to CIR by NECA's manager were scurrilous, scandalous, inappropriate, probably defamatory and irrelevant," (noting committee chairman Pridemore was Moore's "mortal enemy") but then stressed his "objectivity" before the jury.

Moore was not permitted to do any rebuttal to Local 569's case. The jury's deliberations were stopped to ask explanations of arbitrary, discriminatory and bad faith but were given the same instructions again, plus more negligence instructions, over Moore's objections. While paying lip service to the *Hines* doctrine, the court protected Fischbach from trial by flying in the face of *Hines*. Fischbach escaped.19/

Moore didn't have time at trial to make his case against Local 569 on Atkinson's rejection. Cross-examination of witness Wells was suddenly interrupted on grounds Moore's 15 minutes for an adverse witness was up when Wells testified he had intended to "knock [Moore] on his butt."

19/. Moore did not see any jury instructions or the verdict form (which prejudicially begged the question that transfers were a legitimate "practice") but defense counsel did. The court refused to instruct the jury that Unions had a statutory duty "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct" (*Cf. Vaca v. Sipes*, 87 S.Ct., at 910 (1967)), and it would not give an instruction on motive and did not instruct that bias would impair a fair hearing.

Moore was also not permitted any rebuttal to Wells' testimony (the jury also interrupted deliberations to ask for a re-reading of Wells' testimony). When Wells was asked if he was concerned that Moore might sue Atkinson over his decision to reject Moore, Wells testified:

> At the time that didn't occur to me. What did occur to me was the fact that I had seen. . .Larry Moore doing what we call politicing (sic) on the job in my opinion for the prime purpose of being a manager of the Local Union or an officer of high stature or whatever, and/or using his--whatever you want to call it--law knowledge to slap 569's hands by suing them for various things if he didn't get what he wanted; that is the way I saw it.

Wells also testified that he had discussed Moore with Union business manager "Billy Dick [Smith]" and the other Defendants in this case, and he admitted warning another electrician if he wanted to work he shouldn't bite the [Union] hand that feeds him like Moore did. The court said Atkinson negotiated the right to "reject," but admitted Wells had "a foot in [the union] camp." Wells resentfully testified Moore was "a glory seeker for high union office."

The jury was given an inadequate bad faith instruction on Local 569's role in the Atkinson rejection (that same one used for the Fischbach issue: bad faith exists when a joint committee "skewed" hearings to get results other than obvious results). But no joint committee was even involved in the Atkinson case.

Other jury instructions did not adequately cover issues, correctly state the law, or state it at all, and were misleading (instructing the jury to ignore bias of the first trial board).

Moore never saw the first bifurcated trial jury verdict form, which begged the question that Fischbach's transfers were a "practice."

The court made prejudicial comments and instructions throughout the entire first trial. The confused jury requested more definitions of discriminatory, arbitrary and bad faith. Moore said he didn't understand the instructions, but the court sent back the same instructions with even more confusing instructions (mentioning negligence seven times in contrast to the one ludicrous instruction on bad faith), ignoring

requests to modify them.

After the remaining issues were tried the court gave openly prejudicial instructions on Local 569's role in Atkinson's rejection, that the jury couldn't consider § 404(b) evidence of assaults, that Moore's win in another case was not a "final judgment" (it was) and on union expulsion of him for filing the previous case.

Moore was not allowed to add assault claims against Degener back to date of filing, despite his constant requests (ignored) to discover if Degener was a Local 569 agent, and was allowed only an emotional distress claim (Degener lied at trial about his conviction for carrying a concealed weapon at Local 569, belonging to a murder-for-hire group, and Robbins admitted seeing Degener with guns at Local 569).

His motions JNOV or for a new trial on the second Trial Board and the emotional distress claim against Degener, where punitive damages awards were negated on grounds no compensatory damages were awarded (but neither compensatory nor nominal damages had been mentioned in that

special verdict question), were denied.

The court refused injunctions against Union Defendants using disciplinary hearings against Moore. Summary judgment to biased, hand-picked (from 2700 Local members) Trial Board officers was outrageous. FRCP 56(f) Declarations showed refusal to produce requested discovery, and the Defendants were shielded by the court.

After individual officers were dismissed, the court permitted Moore to attempt to put a Trial Boards case together at trial, but only against Local 569. But Defendants' repulsive demeanor during their case sank them (they were paraded on when Moore had no time and could do cross-examination for only 15 minutes). The court helped them with jury instructions that begged the question Moore wronged his assaulter Morrison in the only claim against the IBEW.

Union refusal to permit Moore to question the only witness against him (Smith) in the second Trial Board and illegible transcripts of Trial Board hearings should also have been the subject of jury instructions. But Trial Board

officers' bias was so obvious Moore still won (but the inadequate jury verdict form cheated him out of awarded damages).

Lack of time limited proof and favored the Defendants, because Moore could refute lies as often as they were made, but the court double-whammied Moore by putting him on a short time leash and refusing to make rulings of law.

The Union's trial strategy was limited to personal attacks on Moore, and the lack of time prevented him from rebutting trial allegations by Wells that he politicked on jobs and handed out papers, or had even worked with Wells, and Wells' comments also prejudiced the jury.

Moore showed personal attacks by Westfall, Hahn and Morrison were poorly rehearsed lies, but Simpson, Riel and Aylsworth merely name-called, and those non-factual attacks were impossible to impeach, and required rebuttal.

The court promised a tight time schedule and updated the jury constantly, implying that one extension for Moore delayed the schedule.

The Appeal Court affirmed the lower court,

held Moore was not prejudiced by exclusion of evidence of Fischbach debarments, that Atkinson rejected Moore because he was "litigious and disruptive," that he was barred from objecting to jury instructions on appeal because he did not object at trial (ignoring those instances when he did), and that the district court had "generously extended" trial time (ignoring its refusal to permit rebuttal).

The Appeal Court did not comment on failure to mention "compensatory" and "nominal" damages in the jury verdict form, ignored limitation of attorney fees to claims won (despite all claims being closely related) and to rates paid (not current market rates), ignored denial of expert witness fees requested with attorneys fees, and ignored awards of witness fees to Fischbach and costs of copying Moore's case file to the IBEW.

The Appeal Court affirmed dismissal of his declaratory relief claims by the district court -- for equal space in the Union newsletter and from assessments for the Building Trades, and ignored his request for a jury trial.

VI. ARGUMENT

I.

This petition should be granted because the district court's decision to make breaches of contract (a CBA) subject to later decisions by a joint union-management committee of the same parties who conspired, by breaching the CBA, to defraud the federal government of hundreds of millions of dollars conflicted with applicable decisions of the Supreme Court. Application of Supreme Court precedent here is both clear and unmistakable, and was cited to by the district court to first deny summary judgment motions.

Despite later decisions, Plaintiff was not required to submit that controversy to a group chosen by the defendants against whom the real complaint here was made. *Glover v. St. Louis-S.F. Ry.*, 89 S.Ct. 548, 551-2 (1969).

The court later rejected both precedent and its own holdings to permit that corrupt defense contractor to escape, and by flying in the face of the precedent deliberately sought to confuse the issues and obfuscate the law.

The Unions have a statutory duty to fairly represent bargaining unit members in enforcing CBAs. *Vaca v. Sipes*, 386 U.S. 171 (1967). A member may sue both the IBEW and Local 569 for breach of contract (by violating CBA referral procedures) as was done in this case. *Wooddell v. IBEW Local No. 71*, 112 S.Ct. 494 (1991).

The district court acknowledged Fischbach conspired with Local 569 to transfer employees to Fischbach-created "puppet" entities to evade federal debarment orders, and violated the CBA by the transfers. The court also acknowledged Local 569 business manager Pridemore (who had approved the transfers) and Fischbach conspired via a joint union-management hearing (without a grievance or participation by Plaintiff) and again approved the transfers in order to move for summary judgment a second time.**20**/

Plaintiff eschewed involvement in *ex post facto* hearings, and filed no related breach of DFR claim since Local 569 did not represent him

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20/. S. Appx., at pp. 5-20.

at those hearings (sic). Denial of that second motion for summary judgment (based on argument those hearings were *res judicata* on the court) put "the focus. . .on whether the employer breached the contract. . .." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 568 (1967).

Local 569's breach of duty to Plaintiff and other members to administer the CBA referral procedure fairly (by colluding with Fischbach) also pre-empted its ability to participate in any fair hearing on whether its collusion with Fischbach had resulted in direct CBA breaches.

Thus, Plaintiff's suit to recover damages from Local 569 and Fischbach for violations of the CBA referral procedure would lie under the Labor Management Relations Act authorizing such suits and relieved the Plaintiff of requirement to exhaust CBA remedies. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1967). See also *Del Costello v. Intern'l Broth. of Teamsters*, 462 U.S. 151 (1983); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981); *Czosek v. O'Mara*, 397 U.S. 25 (1970); *Vaca v. Sipes*, 386

U.S. 171 (1967) (if union breaches DFR employer can't insist on exhaustion of CBA remedies).

But the district court made trial on those transfers (Local 569 and Fischbach admitted the breaches of their CBA and their motive) subject to trial on whether Local 569 breached its DFR at grievance hearings held by the conspirators without any grievance ever being filed.

But when the court saw an opportunity to dismiss Fischbach (during trial on the issue of whether Local 569 tainted grievance hearings), it held Local 569 "waived" all rights to those hearings by its "acquiescence" in the transfers (S. Appx. 76). If Local 569 waived the issue being tried, the trial was obviously a sham.

The court also used every device imaginable to subvert even that trial (including refusing to make rulings of law and denying him summary judgment while stating no facts on the original breach were in dispute) and allow defendants to escape from trial on the only issue sued for.

The Appeals Court overstepped boundaries of accepted procedure and sanctioned lower court

departures from the usual course of judicial proceedings by begging that question the lower court contrived: that Plaintiff had challenged finality of arbitration (no arbitrator was ever involved) and that evidence of the hundreds-of-millions-of-dollars-motive was prejudicial and irrelevant, and such dishonesty requires this Court to exercise its powers of supervision.21/

The Circuit Court also ignored Plaintiff's appeal of denial of leave to certify the claim as a class action (S. Appx. at 53-54) which was ironic since he represented a class of the same persons in breach of fiduciary duty causes of action in this case, and won for them.

21/. S. Appx., at pp. 122-23. Moore believes he can infer a collusive relationship between the district court judge and the chief judge of the Ninth Circuit (he heard this appeal) who both sit in San Diego and whose connections to former San Diego resident Ed Meese (tied to one New York corporation that defrauded the Federal Government of $millions) have been published.

The chief judge appointed the author of the biased opinion in *Moore v. IBEW Local 569*, 989 F.2d 1534 (9th Cir. 1993), which opened with an *ad hominem* and hid Moore's wins on every issue at trial. Since he won this case all Moore's judgments were given to the Union and Fischbach (which had threatened Moore repeatedly it would happen if he appealed Fischbach's escape).

II.

This petition should also be granted on the breaches of contract and unfair labor practices committed by Atkinson and the Union Defendants to reject Plaintiff from employment for "union-connected" activities. Refusal to permit those breaches of contract and unfair labor practice from being litigated conflicts with decisions of this Court, and application of the decisions as precedent is clear and unmistakable.

Federal courts have concurrent jurisdiction with the NLRB over breaches of a union's duty of fair representation in the administration of a hiring hall and an accompanying suit against a contractor for breach of contract. *Breininger v. Sheet Metal Workers*, 493 U.S. 67 (1989).

This Court has held a union has the duty

> "to exercise fairly the power conferred upon it in behalf of all of those for whom it acts, without hostile discrimination against them."

Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). Reckless exercise of unions' power to interfere with employment of dissident union

members was overruled both by the NLRB and this Court. *Wallace Corp.*, 50 NLRB 138, *enf'd.*, 323 U.S. 248 (1944). Such abuse of power by unions after passage of the National Labor Relations Act (Wagner Act) in 1935 encouraged Congress to amend the NLRA by passing the Labor-Management Relations Act of 1947. As Senator Taft stated:

> It is contended that the employer should be obliged to discharge the man because the union does not like him. That is what we are trying to prevent. I do not see why a union should have such power over a man in that situation.

93 *Congressional Record*, 4191 (1947).

L.M.R.A. § 8(a) delineates a list of unfair labor practices which forbid both the union and employer from manipulating employees' economic status to tighten or loosen union discipline and control over the membership. Both the NLRB and this Court have held that discipline of a union member by causing his discharge is an unfair labor practice. *Radio Officers' Union, AFL v. N.L.R.B.*, 347 U.S. 17 (1954).

Furthermore, the NLRB has repeatedly found that collusionary employer behavior designed to

strengthen discipline a union can exercise over members is an unfair labor practice, and held the employers and unions jointly responsible, whether because the employer responded to union pressure, it wished to strengthen its congenial relations or it took the initiative to persuade union officers of his good will. *Cf. Food Fair Stores, Inc.*, 131 NLRB 756 (1961) (union member refused to pay assessments); *Checker Taxi Co.*, 131 NLRB 611 (1961) (fired member who irritated the union by pressing monetary claims); *Pacific Maritime Ass'n*, 23 NLRB 559 (1959)(rejected a member who sued the union); *Nassau and Suffolk Contractor' Ass'n*, 123 NLRB 1393 (1959) (fired a member whom the union had expelled); *Falstaff Brewing Corp.*, 128 NLRB 294 (1960) (fired two members who filed written complaint about union representation with Intern'l Union); *Southern Electrical & Pipefiting Inc*, 131 NLRB 44 (1961) (rejected because "unacceptable" to the union).

The NLRB has found specific union actions to be unfair labor practices. *Puerto Rico Dry Dock & Marine Terminals*, 123 NLRB 1298 (1959)

(pressured employer to fire member, on pretext of nonpayment of dues, who had participated in opposition movement). Where employers needing sharply fluctuating access to workers (such as in the construction trades) willingly surrender responsibility for hiring halls to unions, they have traditionally abused their authority and discriminated against non-members and dissident members. The NLRB concluded that any exclusive union hiring halls were *per se* discriminatory, and were a means of thwarting the policy of the LMRA. *Mountain Pacific Chapter of Associated General Contractors, Inc.*, 119 NLRB 883 (1957); *United Association of Journeymen & Apprentices (Brown-Olds)*, 115 NLRB 594 (1956); *Los Angeles-Seattle Motor Express Inc*, 121 NLRB 1629 (1958) Federal courts also agreed. *N.L.R.B. v. Local 176, United Bro'hood of Carpenters and Joiners*, 276 F.2d 583 (union hiring halls discriminate against those choosing to enforce their rights, as illustrated in *Mountain Pacific*).

Rather than outlaw the union administrated hiring hall, the NLRB, in the *Mountain Pacific*

case, established that CBAs must provide for three conditions that would negate an inference of illegal discrimination: nondiscriminatory referral; the employer's right to reject any applicant referred (to counter union favoritism in job referrals); and those nondiscriminatory standards must be posted in the hiring hall.

In 1961 this Court issued four decisions on the same day overruling the NLRB decisions that union hiring halls are *per se* illegal. *Local 357, Intern'l B'hood. of Teamsters v. N.L.R.B.*, 365 U.S. 651; *Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651; *N.L.R.B. v. News Syndicate Co.*, 365 U.S. 695; *Intern'l Typographical Union v. N.L.R.B.*, 365 U.S. 705. NLRB findings of discriminatory referrals must be on a case by case basis.

The history of an employer's ability to reject an employee as interpreted by this Court shows very clearly that both Atkinson and Local 569 officers committed an unfair labor practice and breached the intent of the CBA job referral procedure by colluding to reject Plaintiff for

his "union-connected" activities. Unions must administer referral procedures fairly. *NLRB v. Boilermakers, Local 154*, 253 NLRB 747 (1980).

Atkinson knew Wells committed an unfair labor practice, and argued NLRB preemption in its moving papers and that Plaintiff had missed the NLRB filing deadline. The district court turned its back despite acknowledging Atkinson could not reject Plaintiff for Union activities but erroneously said Moore could be rejected as a contract right as "disruptive and litigious."

Local 569 business manager Smith (who had approved his rejection by phone after Plaintiff accepted Atkinson's request for an electrician and was driving to its jobsite) and assistant Godshalk refused to press and had perfunctorily dismissed the grievance filed by Plaintiff upon return from Atkinson's job site. See *Vaca v. Sipes*, 386 U.S., at 191 (1967).

There was no evidence that Plaintiff was "disruptive" when Atkinson was granted summary judgment, and the district court prejudiced the jury by permitting Wells' allegations that he

"handed out papers on a [previous] job" to be presented without any rebuttal, and by cutting off cross-examination at the point that Wells' resentment and hostility began to show.

The Appeals Court's affirmation of unfair labor practices by holding the employer could reject under the CBA if he didn't discriminate on the basis of "union activity or race or sex" begged the question and set up a straw man, and overstepped boundaries of accepted procedure to sanction lower court departure from the usual course of judicial proceedings so as to require exercise of this Court's power of supervision..

There is no doubt that Plaintiff was the victim of a nationwide Union/NECA practice of interpreting the right to reject as absolute in order to blacklist all dissident union members. *Cf. Parsons Electric and IBEW Local 292*, 304 NLRB 115, 138 LRRM 1214 (1991) (rejection of a Minnesota electrician for his union-connected activities is an unfair labor practice); *N.L.R.B. v. Carpenters Local No. 35*, 739 F.2d 479 (9th Cir. 1984), *cert. denied*, 105 S.Ct.

3477, 87 L.Ed.2d 613 (employee's attempts to change performance of union CBA representatives and correct violations of election procedures and misuse of the union's funds are protected activities). See also *NLRB v. Laborers Int'l Union, Local 300*, 613 F.2d 203 (9th Cir. 1980) cited by the Appeals Court at S. Appx., at 115.

III.

This petition should be heard because the district court's decision to deny recovery of funds after a jury found that union officers breached fiduciary duties to the union by self-dealing union monies to buy golden parachute pensions conflicts with the decisions of all other courts of appeals on the same issues.

The district court's decisions to also deny recovery of union monies used by self-dealing officers for their losing defense against the union's breach of fiduciary duty action -- and to instead impose attorneys fees on the member who successfully sued the self-dealing officers -- also conflicts with all other circuits.

The Circuit Court overstepped boundaries of accepted procedure to sanction these outrageous departures from the usual course of judicial proceedings and used sophistry to ignore even its own precedent, thereby requiring exercise of the Supreme Court's power of supervision.

These two matters also present questions of federal law which have not been, but should be, decided by the Supreme Court. *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949).

This conflict involves an important federal question regarding the scope and the embodiment in the LMRDA by congress of the clear intention that members have the right to full and active participation in their Union's affairs. Local 569 officers dealt with the Union as an adverse party within the meaning of LMRDA § 501 by self-dealing the union's funds.22/

The conflicts related to self-dealing union funds for inflated pensions and to whether in-

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22/. LMRDA § 501 is at Appendix, p. 79.

house counsel can represent officers sued for breaching fiduciary duties by stealing from the union is not one unlikely to recur, since it is endemic, and neither one results from a unique factual situation, nor involves variations in factual bases between conflicting rulings.

The conflicts can be effectively resolved by only the Supreme Court because Plaintiff has exhausted the circuit court appeal process, and the conflict permits aberrations of settled law which create disagreements below, and it should be promptly resolved. Defendants have not been ordered to repay money stolen, or money used to defend against the suit, and pensions were not modified. Defendants' individual Union Pension Trust accounts are all still credited with the fruits of stolen money, and distorted pensions are still being collected.

Plaintiff moved to recuse in-house counsel, but was denied and ordered to pay $6,846.75 in attorneys fees for bringing the motion, posted a bond, prevailed at trial and the bond should have been returned (but see S. Appx. 2, 120).

The jury found officers had breached their fiduciary duty to Local 569 by overseeing, allowing, or ratifying inflated pensions, and 21 officers were named (S. Appx., at 96, 109).

LMRDA § 501(b) expressly authorizes suits "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968). Courts have ordered restitution of money paid to a union officers, and union funds expended in the legal defense. *Kerr v. Shanks*, 466 F.2d 1271 (9th Cir. 1972), *cert. denied*, 412 U.S. 918; *Pignotti v. Sheet Metal Workers' Intern'l Ass'n*, 477 F.2d 825 (8th Cir. 1973), *cert. denied*, 414 U.S. 1067 (pension contributions ordered refunded); *Hood v. Journeymen Barbers, etc.*, 454 F.2d 1347 (7th Cir. 1972); *Morrisey v. Curran*, 482 F.Supp. 31 (DC SDNY 1979), *aff'd, rev'd, and vacated in part on other grounds*, 650 F.2d 1267 (2nd Cir.) (restitution to pension fund required).

Plaintiff's prayer for relief asked that Local 569 be reimbursed for all money taken and

for attorneys fees, costs and damages, but the district court ignored his appropriate requests for restitution, and instead assessed attorneys fees against the Plaintiff because he properly moved to recuse in-house union counsel.

Officials are not entitled to use of union funds to pay fees of attorneys who represented them in § 501 action. *Highway Truck Drivers & Helpers, etc. v. Cohen*, 334 F.2d 378 (3rd Cir. 1964), *cert. denied*, 379 U.S. 921 (1964). The Defendants are not allowed to rely on the legal services of attorneys who served as counsel for the union indirectly involved in the action. *Tucker v. Shaw*, 378 F.2d 304 (2d Cir. 1967); *Yablonski v. United Mine Workers*, 488 F.2d 1175 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (representation of officials by house counsel is a conflict of interest); *Kerr v. Shanks*, 466 F.2d 1271, 1277 (9th Cir. 1972), *cert. denied*, 412 U.S. 918; *Holdeman v. Sheldon*, 204 F.Supp. 890, *aff'd*, 311 F.2d 2 (2d Cir. 19__).

Courts have unanimously granted attorneys fees where unions benefitted from such suits,

and not just where plaintiffs recovered money. *Highway Truck Drivers v. Cohen*, 220 F.Supp. 735 (E.D. Pa. 1963); *United Bhd. of Carpenters v. Brown*, 343 F.2d 872 (10th Cir. 1965); *Gilbert v. Hoisting and Portable Engineers*, Local 701, 384 P.2d 136 (1963), *cert. denied*, 376 U.S. 963 (1964) (attorneys fees awarded and fact that no money or property was involved did not detract from importance of the litigation), 390 P.2d 320 (1964) (attorneys fees awarded on appeal); *Bakery & Confectionery Workers v. Ratner*, 335 F.2d 691 (D.C. Cir. 1964) (attorneys fees are allowable for other than monetary relief); *Intern'l Ass'n of Bridge, etc. v. Norris*, 383 F.2d 735 (5th Cir. 19___) (attorneys fees attaches if some benefit realized).

There is no such authority for any award of attorneys fees against a member who sucessfully represents the union in a suit against officers for breach of fiduciary duty under LMRDA § 501, and the district court decision to impose such fees was unjustified, as was the Appeal Court's invalid alibi (S. Appx., at pp. 120-21).

IV.

The district court's decision to grant the IBEW and Local 569 summary judgment on claims that the IBEW "policy" used to stop Plaintiff from running for IBEW convention delegate was reasonable conflicts with applicable decisions of the Supreme Court, application to the case at hand is clear and unmistakable, and courts below failed to follow that precedent.

The Appeals Court overstepped boundaries of accepted procedure to sanction those departures from the usual course of judicial proceedings, and by calling a policy a rule to dismiss for

> "lack of subject matter jurisdiction . . . over a claim that challenges the rules governing the eligibility of candidates for union office."

S. Appx. at 126. It thereby solicited exercise of the Supreme Court's supervision powers.

Plaintiff belongs to two Unions, the IBEW and Local 569. *Wooddell v. IBEW Local 71*, 112 S.Ct. 494 (1991). IBEW "policy" is to prohibit members who oppose business managers of Locals from running for convention delegate. A Bylaw which is mandatory for all Locals combines with

that policy to ensure absolute control by IBEW officers over the conventions where the IBEW constitution is written, its president, vps and executive board are elected. That Bylaw makes incumbent business managers and presidents both automatic "appointed" convention delegates (the IBEW pays their way to the convention).

The justification for an eligibility rule having a pronounced undemocratic effect is by showing the rule serves valid union interests. *Doyle v. Brock*, 821 F.2d 778 (D.C. Cir. 1987), citing *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305, 97 S.Ct. 611, 50 L.Ed.2d 502 (1977) (invalidating other restrictive IBEW imposed Bylaws). IBEW interests aren't valid.

Abuse of the unarticulated "policy" by the IBEW as an unduly restrictive qualification is fully actualized, and combined with a mandatory bylaw, results in a large undemocratic effect. *Wirtz v. Hotel, Motel & Club Employees Union*, 391 U.S. 492, 88 S.Ct. 1743, 20 L.Ed.2d 763 (1968) ("implicit in the legislative history of the [LMRDA] and in its wording" is that every

member in good standing shall be eligible to run for office and such unduly restrictive candidacy qualifications can result in the very abuses of entrenched leadership that the LMRDA was expressly enacted to curb); *Retail Clerks Local 648 v. Retail Clerks Intl. Ass'n*, 299 F.Supp. 1012 (DC D.C. 1969) citing *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963); *New England Telephone and Telegraph Co. v. I.B.E.W.*, 384 F.Supp. 752 (D.C.Mass. 1974).23/

The policy and bylaw that automatically

23/. The policy to disqualify members who run against Locals' incumbent business managers and presidents eliminates convention dissent. Both incumbents are the first 2 appointed delegates. 755 Locals send only one or two delegates (10 members can send one appointed delegate, but a Local must have 626 members to send the third (its first) elected delegate, and 1,126 members to send 5 -- 3 elected and 2 appointed.

IBEW vice-presidents and Executive Boards are elected in caucuses where each Local gets one vote, decided by the Local's delegates (a tie vote means no vote). In order to out-vote the two appointed delegates a Local has to be able to send five delegates. Only 168 Locals send 5 or more delegates (133 send 3 or 4).

The result is a majority of 1547 appointed delegates and 1080 elected. The IBEW president is elected and the constitution is amended by non-secret roll call vote.

sends Locals' business managers and presidents to the IBEW convention is also a deliberate unlawful attempt to suppress dissent within the union. *Cotter v. Owen*, 753 F.2d 223 (2nd Cir. 1985). Moore's rights were violated by the undemocratic, unconscionable "policy."

> A qualification which is not part of the constitution and bylaws or other duly enacted rules of the organization may not be the basis for denial of the right to run for office, unless required by Federal or State law.

29 C.F.R. Sec. 452.53, as quoted in Kaplan, Qualifications for Union Office, 24 ALR Fed 651, at 657. Elimination of the IBEW policy would move it toward the Congressional goal of union democracy articulated in the L.M.R.D.A.

V.

The district court decision to grant Local 569 summary judgment (on claims that his LMRDA Title I rights were violated by pre-election conduct of incumbent officers in 1986 and 1989 elections) on grounds a separate suit by the U.S. Secretary of Labor under LMRDA Title IV

for election irregularities was *res judicata* on Plaintiff's suit conflicts with the applicable decisions of the Supreme Court, application to the case at hand is clear and unmistakable, and courts below failed to follow that precedent.

The Circuit Court overstepped boundaries of accepted procedure to sanction these outrageous departures from the usual course of judicial proceedings by the district court, and used sophistry to state falsely that,

> "Moore had previously sought relief for these claims through an action filed with the Department of Labor. The department and Local 569 settled these claims. Another district court approved the settlement. The record supports the court's conclusion that res judicata barred Moore from relitigating.

S. Appx., at p. 127. On its face that ruling shows Plaintiff did not seek relief from the DOL for his Title I claims (DOL jurisdiction is over Title IV), that he was never a party (or intervenor) who "settled" an action filed with the DOL, and was not "relitigating" any claims.

By approving the district court's false record and deliberately making its false record

the appellate court shows it requires exercise of the Supreme Court's powers of supervision.

Blackwood and his agents abused Union funds to support his candidacy in the 1986 election, and Smith used union funds to oppose the DOL's suit for a new election because of that abuse.

On November 21, 1988 and April 1, 1991 the district court denied Local 569's motions for summary judgment on claims it violated LMRDA Title I rights of the Plaintiff during the 1986 campaign, and rejected arguments that Plaintiff was challenging the election (S. Apx., at 48).

But during matters in limine Local 569 was granted summary judgment on the Title I claims based on *res judicata* effect of the denial of summary judgment to the DOL in its LMRDA Title IV action to force a new election. Plaintiff's claim for infringement of LMRDA Title I rights by officers' use of union funds and facilities during the 1986 and 1989 elections was denied.

The Supreme Court has stated that Title I claims for pre-election conduct are not barred by Title IV as long as the Title I claim does

not challenge the validity of that election. *Local No. 82, Furniture & Piano Movers v. Crowley*, 104 S.Ct. at 2566, n. 16 (1984), citing *Ross v. International Brotherhood of Electrical Workers*, 513 F.2d 840 (9th Cir. 1975) (validating a post election common-law tort claim); *Dunlop v. Bachowski*, 95 S.Ct. at 1857-58 (1975) (LMRDA Title I provisions on pre-election conduct are enforceable in post-election suits by union members); *Kapau v. Yamamoto*, 622 F.2d 449, 455 (9th Cir. 1980).

VI.

Lower court summary judgment to Local 569, the IBEW and their officers on his claims they violated LMRDA §§ 101 and 609 by disciplining him conflicts with Supreme Court decisions, and application to this case is clear, unmistakable and lower courts failed to follow precedent.

The Appeals Court overstepped boundaries of accepted procedure to sanction these outrageous departures from the usual course of judicial proceedings by the district court, requiring an

exercise of this Court's power of supervision for their application of false standards.

By approving the lower court's false record the appellate court shows it requires exercise of the Supreme Court's powers of supervision.

The Supreme Court has decided the "Congress . . . meant instead to denote only punishment authorized by the union as a collective entity to enforce its rules" by "discipline" as used in §§ 101 and 609. *Breininger v. Sheet Metal Workers*, 110 S.Ct. at 438-39 (1989). Officers acted "under color of the Union's right to control Plaintiff's conduct in order to protect the interests of the union or its membership" to illegally discipline him here.

Fines, suspensions, expulsion, assaults and blacklisting reached a fever pitch after Moore complained about the 1986 election and increase of an assessment for the Building Trades, and opposed proposals for a new CBA. No voting was allowed on his proposed Bylaws until his second suspension and after passing the IBEW president vetoed them and a Bylaw for recalling officers.

Charges against Local 569 and IBEW officers as per the IBEW constitution (they must be made to the same IBEW officers) on their attempts to discipline him by violating his free speech rights, assaults and batteries were ignored.

Appeals of fines, suspensions, denials of complaints on elections, affirmations of Trial Board fines and suspensions, vetoes of bylaws proposals, interference with CBA proposals and wrongful impositions of Bylaws and assessments were also ignored for ten years.

IBEW officers found no wrongful acts by the Local officers despite contrary findings by the DOL and two juries in two cases. The court has found nothing wrong in IBEW officers' approach to their appellate and review functions, and it always used sophistry to dismiss them (and the Appeals Court always affirmed) even when Barry held charges against officers in abeyance until this case was decided, while refusing to hold fines and suspensions of Plaintiff in abeyance (after the district court dismissed claims related to appeals, complaints and charges,

IBEW president Barry then dismissed them all).

VII.

Summary judgment was granted to Plaintiff on Local 569's illegal increase of assessments for the Building Trades, but not refunded to others despite a clear prayer for relief and motion to bring all such acts in the Complaint under the breach of fiduciary duty claim.

The assessment is not a legitimate expense of collective bargaining because the Building Trades is not even the exclusive representative of any bargaining unit. *Cf., Lehnert v. Ferris Faculty Ass'n*, 111 S.Ct. 1950 (1991); *Intern'l Ass'n of Machinists v. Street*, 81 S.Ct. 1784 (1961). Prayers for declaratory relief from paying the assessment as a condition of getting hiring hall job referrals, for equal space to respond to attacks in the Union newsletter, and on other declaratory relief claims should have been given to the jury. F.R.C.P. 57; *California v. Sierra Club*, 451 U.S. 287 (1981).

VIII.

Plaintiff's request for attorneys and law clerks fees for related claims at market rates were modified to rates paid for claims won, and conflicts with decisions of the Supreme Court. *Blum v. Stenson*, 465 U.S. 886 (1984); *Missouri v. Jenkens*, 109 S.Ct. 2463 (1989). His request for expert witness fees as part of the attorney fees award should have been granted. *Thornberry v. Delta Airlines, Inc*, 676 F.2d 1240 (9th Cir. 1982), citing *Northcross v. Board of Education of Memphis City Schools*, 447 U.S. 911 (1980).

The breach of contract against Fischbach did not come to trial, it was never a party at trial and shouldn't have been awarded $350.00 for a witness called by Local 569 in its case. Nor should the IBEW have been awarded $750.00 "exemplification" costs for copying Plaintiff's entire case file (after the court ordered him to permit that), none of which was ever used as an exhibit in the case at any time.

Dated: 9-01-1994 Lawrence Moore

Lawrence Moore

APPENDIX

page

National Labor Relations
Act § 8 (29 U.S.C. 158) 68

Labor Management Relations
Act § 301 (29 U.S.C. 185) 71

Labor Management Reporting and
Disclosure Act § 2 (29 U.S.C. 401) 73

Labor Management Reporting and
Disclosure Act § 101 (29 U.S.C. 411) 76

Labor Management Reporting and
Disclosure Act § 501 (29 U.S.C. 501) 80

Labor Management Reporting and
Disclosure Act § 609 (29 U.S.C. 529) 83

NATIONAL LABOR RELATIONS ACT

Unfair Labor Practices (29 U.S.C. 158)

Sec. 8 (a)It shall be an unfair labor practice for an employer --

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election

held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in

section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the

circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

LABOR MANAGEMENT RELATIONS ACT

Suits By and Against Labor Organizations

(29 U.S.C. 185)

Sec. 301. (a) Suits for violation of contracts between and employer and a labor organization representing employees in an industry affecting commerce as defined in the Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose

activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United

States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Declaration of Findings, Purposes, and Policy

(29 U.S.C. 401)

Sec. 2. (a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they

represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations

consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market

for goods flowing into or from the channels of commerce.

TITLE I - BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS (29 U.S.C. 411)

Sec. 101. (a)(1) Equal Rights. - Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of Speech and Assembly. - Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and

reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, Initiation Fees, and Assessments. - Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except -

(A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such

question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until

the next regular convention of such labor organization.

(4) Protection of the Right To Sue. - No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly finance, encourage, or participate in, except as a

party, any such action, proceeding, appearance, or petition.

(5) Safeguards Against Improper Disciplinary Action. - No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

TITLE V - SAFEGUARDS FOR LABOR ORGANIZATIONS

Fiduciary Responsibility of Officers of Labor Organizations (29 U.S.C. 501)

Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and

to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is

alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses

necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

TITLE VI - MISCELLANEOUS PROVISIONS

Prohibition on Certain Discipline by Labor Organization (29 USC 529)

Sec. 609. It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.

Supreme Court, U.S.
FILED

94 439 SEP - 7 1994

OFFICE OF THE CLERK

CASE NO

THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1994

LAWRENCE MOORE,

PLAINTIFF/PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; PAUL BLACKWOOD; THOMAS PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK, et al, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; J.J. BARRY; S.R. McCANN; RICHARD ROBBINS; ATKINSON MECHANICAL, INC.; FISCHBACH & MOORE, INC.

DEFENDANTS/RESPONDENTS.

PETITION FOR
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

Lawrence Moore, Pro Se
Box 84525
San Diego, Ca 92138
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137 pp

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TABLE OF CONTENTS page

Order Denying Motion for Recusal (Disqualification) of Counsel - filed May 1, 1989 1

Order Granting Atkinson Mechanical Contractors Motion for Summary Judgment - filed May 10, 1990 3

Order Denying F & M's Motion for Summary Judgment on Plaintiff's Fifth Cause of Action - filed March 19, 1991 5

Order affirming magistrate judge's order; bifurcating trial; granting in part and denying in part motion for summary judgment by defendant IBEW; granting in part and denying in part motion for summary judgment by defendant Local 569 - filed May 2, 1991 ... 23

Order dismissing plaintiff's objection to order of magistrate judge; denying plaintiff's motion to amend and for class certification; granting defendants' motion for protective order; dismissing plaintiff's notice of default of J.J. Barry; denying defendant Fischbach & Moore's motion for reconsideration; granting in part and denying in part defendant Fischbach & Moore's motion to dismiss - filed June 5, 1991 52

Order re motions for reconsideration and motions in limine - filed July 16, 1991 61

Order denying F & M's Motion for Summary Judgment - filed August 7, 1991 74

Findings of Fact and Conclusions of Law, Judgment on Court Trial and Judgment on Special Verdict - March 18, 1992 79

Memorandum of the Court of Appeals - filed on June 10, 1994 111

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order Denying Motion for Recusal

(Disqualification) of Counsel

Filed May 1, 1989.

Plaintiff Lawrence Moore's Motion for Recusal (disqualification) of Counsel came on for hearing before this Court on Monday, April 24, 1989, at 10:30 A.M. Plaintiff's Motion sought, inter alia, to disqualify counsel for IBEW Local 569 from representing certain of the individual Local Union Defendants whom Plaintiff has alleged have violated their fiduciary duties under 29 U.S.C. §501. Appearing for Plaintiff and moving party, Lawrence Moore, was Lawrence Moore In Pro Per; Plaintiff Walter Whelan appeared by and through his counsel, George de la Flor; Defendants IBEW Local 569 and the individual Local Union officers/employees appeared by and through their counsel, Abe F. Levy and Lewis N. Levy, and Defendant IBEW International appeared by and through its local counsel, Jennifer T.

Messersmith.

GOOD CAUSE APPEARING THEREFORE, and based upon the parties' points and authorities and oral arguments before the Court, the Court denied Plaintiff's Motion for Disqualification on the basis that Plaintiff had not demonstrated a reasonable likelihood of success with respect to his prosecution of a breach of fiduciary duty action, under 29 U.S.C. §501, against the individual officers who were the subject of the instant Motion for Recusal (Disqualification). Additionally, the Court orders Plaintiff and moving party, Lawrence Moore, to reimburse the Defendants who responded to this Motion all costs, including reasonable attorney's fees, generated in opposing the instant motion.

IT IS SO ORDERED. DATED: May 1, 1989

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Order Granting Atkinson Mechanical Contractors Motion for Summary Judgment

Filed May 10, 1990

Defendant Atkinson Mechanical Contractors, Inc's Motion for Summary Judgment/Adjudication as to Plaintiff's Fifth Cause of Action in the Second Amended Complaint came on for a hearing before this court on April 16, 1990 at 10:30 A.M., before the Honorable Rudi M. Brewster, presiding. Theodore R. Scott of Littler, Mendelson, Fastiff & Tichy, appeared on behalf of moving party. Plaintiff Lawrence Moore appeared In Propria Persona.

Good cause appearing therefore, and based on the parties' arguments as raised in their moving, opposing and reply papers, their oral arguments before this court, and the court's files in this matter, which are incorporated herein as though fully set forth,

IT IS ORDERED that Defendant Atkinson's Motion for Summary Judgment as to the

allegations of Plaintiff's Fifth Cause of Action in the Second Amended Complaint is hereby granted.

IT IS SO ORDERED. DATED: May 9, 1990

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order Denying F & M's Motion for Summary Judgment on Plaintiff's Fifth Cause of Action - March 19, 1991

The above captioned matter came on regularly for hearing on February 25, 1991, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona, and Norman R. Allenby, Esq., and Dorothy J. Almour, Esq., appeared for defendant Fischbach & Moore. Upon consideration of Fischbach & Moore's motion for summary judgment on the fifth cause of action, and the oral argument thereon, the court hereby enters the following memorandum opinion and order.

FACTUAL AND PROCEDURAL BACKGROUND

On February 20, 1990, this court heard Fischbach & Moore's motion for summary judgment on the seventh cause of action of plaintiff's second amended complaint. That cause of action alleged that Fischbach & Moore provided employees to another signatory employer --

Corbin-Dykes -- without following the provisions of § 4 of the Inside Agreement, which provides certain procedures governing the hiring of employees from the out-of-work list. In its motion for summary judgment, Fischbach & Moore argued that jurisdiction over this cause of action rested with the National Labor Relations Board (NLRB), not the district court, and that Fischbach & Moore and Corbin-Dykes were one employer under the Inside Agreement.

In denying Fischbach & Moore's motion for summary judgment this court held that the federal district court and the NLRB have concurrent jurisdiction to hear claims based on the breach of a collective bargaining agreement, and that issues of fact remained as to whether Fischbach & Moore and Corbin-Dykes were separate entities for purposes of the Inside Agreement.

In the third amended complaint, the allegation against Fischbach & Moore now comprises the fifth cause of action, and has been slightly reformulated. However, the

essential allegations are identical.

Fischbach & Moore now asserts that the present action against it is barred by *res judicata* in light of an adverse ruling suffered by the International Brotherhood of Electrical Workers ("IBEW") on an identical allegation before the Council on Industrial Relations for the Electrical Contracting Industry ("Council"). Fischbach & Moore alleges that plaintiff had brought a grievance against the IBEW in which plaintiff claimed that the IBEW had failed in its duty of fair representation by allowing Fischbach & Moore to transfer employees to Corbin-Dykes.1 By letter dated August 24, 1990, counsel for the Local notified plaintiff that a grievance procedure had been commenced before the Labor-Management Committee ("Committee") in San Diego, pursuant to the

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1 Local Union 569 of the IBEW ("Local") and the IBEW, both defendants in the present case, have jointly filed a brief in support of Fischbach & Moore. As their only point of contention with Fischbach & Moore, the Local and the IBEW assert that this grievance was in fact filed against Fischbach & Moore, not the IBEW.

Inside Agreement. Cooper Declaration, Exhibit B. The Committee deadlocked on the grievance, and forwarded it to the Council, which sits in Washington, D.C. Cooper Declaration, Exhibit C.

On November 15, 1990, the Council issued its ruling in favor of Fischbach & Moore, finding no violation of the referral procedure promulgated in § 4 of the Inside Agreement. According to the Council, "inasmuch as Fischbach & Moore signed documents stating they were responsible for all of Corbin-Dykes' debts and responsibilities, the Union properly regarded them as one employer for the purposes of Referral Procedure." Cooper Declaration, Exhibit G.

Plaintiff did not participate in any of these proceedings. In response to the notification letter from the Local's counsel, plaintiff wrote that "[a]ll such matters will now be litigated before the district court, and not before any 'Committee' as represented in your letter." Moore Declaration, Exhibit B.

Throughout the arbitration process, plaintiff's position was purportedly asserted by the Local.

Plaintiff claims that he never filed a grievance against the Union or F & M. Factually, plaintiff's allegation is supported by the evidence before the court. Neither Fischbach & Moore nor any of the other defendants have produced any record of a grievance filed by plaintiff. In fact, the Declaration of Dick Smith states that "[t}he first notice that the Union had of Lawrence Moore and Walter Whelan's discriminatory dispatch issue was when I was served with the complaint in Case NO. 87-0172-B(M)." If Smith, as business manager of the Local, was unaware of any grievance filed by plaintiff, then the court infers that none was filed by plaintiff.

Regardless of whether plaintiff filed the grievance himself, Fischbach & Moore now claims that summary judgment is appropriate because the Inside Agreement states that arbitration is the sole and exclusive remedy for alleged violations of any section of that

Agreement and the decision of the arbitrator is final and binding on all parties. Cooper Declaration, Exhibit A (Copy of Inside Agreement), §§ 1.04-1.06.

Section 1.06 (A-2) of the Inside Agreement provides that "these provisions shall be the sole and exclusive remedy for any claims or alleged violation of any Section of this Agreement or any grievances arising pursuant to any of the provisions of this Agreement." The same section continues: "The final decision of the grievances resolution bodies [the Committee and the Council] shall be final and binding upon all parties hereto, including the employees employed by employers, pursuant to the provisions of this Agreement."[2]

In addition to its *res judicata* argument, Fischbach & Moore asserts that plaintiff's

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2 Section 1.06 (A-2) concludes by stating that any party who "initiates legal proceedings attacking . . . the final decision of an arbitration, appeals or appellate body established pursuant to this section. . . who is unsuccessful in such endeavor, shall pay the reasonable costs and attorney fees of the party prevailing in such action or litigation."

claim is barred by a six-month statute of limitations on breach of contract claims contained in 29 U.S.C. § 160(b). Since plaintiff's complaint was filed in February, 1987, all breaches occurring before July, 1986 allegedly are not actionable. Plaintiff responds that the applicable statute of limitations is four years.

In addition to opposing the motion on the merits, plaintiff alternatively argues that summary judgment would be premature at this time under Fed. R. Civ. Proc. 56(f). Plaintiff has also moved for sanctions.

DISCUSSION

I. Summary Judgment Standard

In order to prevail on a motion for summary judgment, the moving party must establish that no material fact is in "genuine dispute" such that a "reasonable jury could not return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Fuller v. Frank, 916 F.2d 558, 562 n. 6 (9th Cir. 1990).

II. Fischbach & Moore's Motion for Summary Judgment

A. The Finality Doctrine

As recognized by § 203 (d) of the Labor Management Relations Act ("LMRA") and the Supreme Court, arbitration provisions in collective bargaining agreements generally are final and district courts do not have the power to review the merits of arbitration rulings. See United States Steel Workers v. American Manufacturing Company, 363 U.S. 564 (1960); United States Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United States Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) ("Steel Workers Trilogy"); A T & T Technologies v. Communications Workers, 475 U.S. 643, 648 (1985) (reaffirming Steel Workers Trilogy).

As described above, the evidence presented to the court suggests that plaintiff did not file a grievance attacking the hiring procedures of Fischbach & Moore. Fischbach & Moore argues that this is immaterial because

the Local and Fischbach & Moore properly brought the issue to the Committee under § 301 of the LMRA, since the question involved contract interpretation. According to Fischbach & Moore, grievances under the Inside Agreement are not initiated by individual members; rather, such grievances are initiated by the Local Union or the local National Electrical Contractors Association chapter. In whatever manner the arbitration process is initiated, it is asserted that the individual's lack of participation "does not affect the binding nature of the decision." See Mosely Declaration, para. 20.

If this case presented a typical union-employee-employer relationship, Fischbach & Moore's argument on this point would be persuasive. Because plaintiff, as a member of the Union, is a signatory to the Inside Agreement, it is clear that his participation is not necessary in order for the arbitrator to render a final, non-appealable decision on this issue.

However, where the union does not fairly represent the employee against the employer, the finality doctrine of Steel Workers Trilogy does not apply. Hines v. Anchor Motor Freight, 424 U.S. 554, 563 (1975). In Hines v. Anchor Motor Freight, 424 U.S. 554, 563 (1975). In Hines, union truck drivers were allegedly discharged without cause by their employer. Id., at 556-57. The union took the matter to the arbitration committee, but failed to competently investigate or present the drivers' defense. Id., at 559-60 n. 4. The discharge was upheld by the arbitration committee. Id., at 557-58. The district court dismissed the drivers' complaint because of the finality doctrine, Id., at 559, and the Court of Appeals affirmed. Id., at 560.

In reversing, the Supreme Court held:

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract.

Id., at 567. By so holding, the Court explicitly rejected the policy argument urged by the employer, who reasoned that "the employer must be protected from relitigation by the express contractual provision declaring a decision to be final and binding." Id., See also Vaca v. Sipes, 386 U.S. 171, 186 (1967) (employer may not insist on exhaustion when union has breached its representation duty in processing grievance). This court recognizes the employer's policy argument in Hines as being identical to that asserted by Fischbach & Moore in this case.

The Ninth Circuit, in considering the finality doctrine where the union has unclean hands, has held:

> To us, it makes little difference whether the union subverts the arbitration process by refusing to proceed as in Vaca or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation.

Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974).

B. Finality in this Case

Fischbach & Moore's efforts to distinguish Hines and its progeny are unpersuasive. Fischbach & Moore argues that each of the cases cited above, as well as some others cited by plaintiff, involve suits against employers in which the employee is seeking to preserve "uniquely personal" rights encompassed by § 301. As examples of such rights, Fischbach & Moore notes that the Supreme Court in Hines mentioned wages, hours, overtime pay, and wrongful discharge.

In this case, Fischbach & Moore argues that plaintiff is asserting a mere contractual right under the Inside Agreement. Fischbach & Moore's position creates a distinction without a difference. Plaintiff is suing the employer for breach of the collective bargaining agreement. If plaintiff is improperly relegated to the out of work list because of Fischbach & Moore's conduct, then plaintiff's asserted right falls squarely within those contemplated by Hines, regardless of the

semantic labels Fischbach & Moore wishes to attach to that right.[3]

In order to avail himself of the protection afforded by Hines in resisting a motion for summary judgment, plaintiff must demonstrate that a genuine issue of material fact exists as to whether the union's breach of duty "seriously undermines the integrity of the arbitral process . . ." Hines, 424 U.S. at 567. The parties have focused on the impartiality of the Committee and the Council, without reference to the relationship between the Local and plaintiff. See Opposition Brief, pp. 7-13; Reply Brief, pp. 7-12. By so doing, Fischbach & Moore and plaintiff have ignored the crucial issue under Hines. The issue is not the

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3 If Fischbach & Moore's position were correct, then no remedy would exist for an employee unfairly represented by his or her union where the arbitration dispute involved "contractual" rights. Accepting Fischbach & Moore's position, this court would be forced to conclude that no matter how egregious the union's lack of representation, the "safety net" created by Hines would not be available simply because of the label attached to the right. This court declines to accept this reading of Hines.

partiality or corruptness of the Council and the Committee; rather,the issue is whether plaintiff, as a member of the Local allegedly injured by Fischbach & Moore's transfer practices, was fairly represented by the Local in the administrative process. If not, then the finality doctrine does not apply.

This court finds that a genuine issue of material fact exists as to whether a conflict of interest existed between plaintiff and the Local, such that the Local did not represent plaintiff's position fairly before the Committee and the Council. Specifically, the participation of the current Local business manager Tom Pridemore may have tainted the arbitration proceeding. Pridemore, who is a defendant in the present action, submitted a declaration to this court in support of Fischbach & Moore's earlier motion for summary judgment. In that declaration, Pridemore verified certain business records of Fischbach & Moore, and concluded: "Therefore, Fischbach & Moore, Inc. and Corbin-Dykes Electric are one

employer for the purposes of the hiring hall agreement." Cooper Declaration, Exhibit D (Pridemore Declaration contained therein).[4]

However, once this court ruled against Fischbach & Moore, and the arbitration process began, Pridemore became the Local's (and therefore plaintiff's) advocate in attacking the hiring practices of Fischbach & Moore. In the Labor-Management Committee hearing, Pridemore sat as a union representative, as did two other defendants in this case. More importantly, when the issue went to the Council, Pridemore signed the Local's brief and appeared for the Local at the hearing. Cooper Declaration, Exhibits E, G.

Given the history of this case, the court

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4 Fischbach & Moore attempts to limit the impact of this declaration by stating that it was purely an evidentiary vehicle, but did not "state any position either 'for' or 'against' Plaintiff Moore." This statement is incorrect. As noted above, Pridemore concluded in his declaration that F & M and Corbin-Dykes were one entity, a position which is directly contrary to Moore's claim in this lawsuit and the purported position of the Local in the arbitration process.

concludes that an issue of fact remains as to the Local's fulfillment of its duty of fair representation.[5] Accordingly, the Hines exception may apply to this case and preclude Fischbach & Moore from relying on the finality doctrine enunciated in Steel Workers Trilogy. Therefore, Fischbach & Moore's motion for summary judgment on this ground must be denied.

C. Statute of Limitations

Fischbach & Moore asserts in the alternative that a breach of contract claim against an employer must be brought within six months under 29 U.S.C. § 160(b). Plaintiff argues that the relevant statute of limitations

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5 The court takes judicial notice of the evidence received during the trial in Civil Case No. 85-1719-B. Accordingly, the court recognizes the long running dispute between plaintiff and the Local, a dispute which has now been before this court for more than five years. Although this court is not in a position to quantify the effect of this dispute on the ability of the Local to oppose Fischbach & Moore on plaintiff's behalf in an arbitration context, the court observes that the deterioration of the relationship between plaintiff and his union raises serious questions as to whether the finality doctrine should be imposed on plaintiff.

is four years, pursuant to California law. Both sides cite DelCostello v. Teamsters, 462 U.S. 151 (1983), in which the Court held that in the absence of an applicable federal statute of limitations, courts should apply the most closely analogous statute of limitations under state law. In DelCostello, the employee's suit sought to vacate an arbitration award, and the Court found that there was no closely analogous state statute of limitations. Id., at 166-68. Accordingly, the Court applied the six-month statute of limitations provided by § 10(b) of the National Labor Relations Act. Id., at 171. However, where the suit is for breach of the collective bargaining agreement against the employer, the Court applies the state statute of limitations for breach of contract. See Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966).

In this case, while an arbitration award is involved, plaintiff's cause of action against Fischbach & Moore, unlike the complaint in DelCostello, does not seek to vacate the

arbitration award. Rather, plaintiff is alleging violation of the collective bargaining agreement by the employer, as in Hoosier Cardinal. Therefore, the California breach of contract statute applies, and Fischbach & Moore's motion for summary judgment on this ground must be denied.

III. Discovery and Evidentiary Disputes

Because the court has reached its ruling based only upon the evidence and declarations cited in this memorandum opinion, the court need not reach the various evidentiary issues asserted by the parties. Moreover, plaintiff's argument under Rule 56(f) is moot since the motion for summary judgment has been denied on the record presently before the court.

IV. Sanctions

Plaintiff requests sanctions against counsel for Fischbach & Moore. No good cause appearing, the motion is denied.

IT IS SO ORDERED. DATED: March 19, 1991

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order affirming magistrate judge's order; bifurcating trial; granting in part and denying in part motion for summary judgment by defendant IBEW; granting in part and denying in part motion for summary judgment by defendant Local 569

May 2, 1991

The above captioned matter came on regularly for hearing on April 1, 1991, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona; Lewis N. Levy, Esq., appeared on behalf of defendant Local 569 of the International Brotherhood of Electrical Workers and the individual Local defendants (Local 569); Terry R. Yellig, Esq., appeared on behalf of defendant International Brotherhood of Electrical Workers and the individual International defendants (IBEW); and Norman R. Allenby, Esq., and Dorothy J. Almour, Esq., appeared on behalf of defendant Fischbach & Moore (F & M). Upon consideration of the supporting and opposing briefs, and the oral argument thereon, the court hereby enters the

following order.

I. Appeal from the Magistrate Judge's Order

The order of the Magistrate Judge requiring plaintiff to undergo a physical examination at the IBEW's expense is affirmed. The court finds that plaintiff's objections to the qualifications of the doctor selected by the IBEW are without merit. Likewise, the order of the Magistrate Judge denying the IBEW's request that plaintiff undergo a mental exam is affirmed.

II. Motion for Separate Trial by F & M

The court finds that the fifth cause of action against defendant F & M is sufficiently independent from plaintiff's other causes of action that bifurcation is warranted. Subject to change as future events may warrant,[1]

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1 The court notes that F & M has filed a motion for reconsideration of the order denying summary judgment in its favor, and a new motion for dismissal based upon plaintiff's alleged lack of standing. Concurrently, plaintiff is seeking leave to amend his third amended complaint (TAC) in order to expand the scope of his allegations against F & M.

the court will bifurcate the trial so that the fifth cause of action against F & M will proceed first before the jury, after which the jury shall return a verdict on that cause of action only, followed by the remainder of the case against Local 569 and the IBEW before the same jury.2

III. Motion for Summary Judgment by IBEW

A. First Cause of Action: Duty of Fair Representation

The IBEW argues that plaintiff can only bring this claim against Local 569, since the latter defendant is the exclusive bargaining representative of the union members. The law is clear that "[a]n international or regional affiliate of a local union may not be liable

2 The court recognizes the reciprocal impact the bifurcated trials may have on each other, e.t., if F & M's transfer policy does not constitute a breach of the Inside Agreement, then a fortiori the Local did not breach its duty of fair representation in failing to protect its members from said policy. Such impacts shall be managed by the court as they arise, and do not outweigh the prejudice which F & M will endure if the case is not bifurcated.

for the local's unfair labor practices merely by virtue of its affiliation with the local." Abreen Corp. v. Laborers' Int'l Union, 709 F.2d 748, 757 (1st Cir. 1983), cert. denied, 464 U.S. 1040 (1984). As the First Circuit has held in applying § 301 of the Labor Management Relations Act (LMRA):

> A plaintiff seeking to place liability on an international for a local's allegedly illegal conduct must further show that the local acted as the international's agent or that the international independently participated in the unlawful conduct.

Boroweic v. Local No. 1570, 889 F.2d 23, 26 (1st Cir. 1989) (citing Abreen, 709 F.2d at 757, and Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212, 213-17 (1979).

In response to the general rule, plaintiff posits two factual assertions: (1) the IBEW has a veto power over all local union contracts; and (2) the IBEW signed and ratified the Local's contract with Atkinson Mechanical Contractors (Atkinson).3

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3 The Atkinson Agreement was actually

Upon review of the Atkinson Agreement, the court finds that the IBEW's position is persuasive. The signature pages of the Atkinson Agreement reveal that only the Local Business Manager, defendant Paul Blackwood, signed the document. On that page, there is an IBEW stamp which states, "Portion agreed to and signed by LU 569 is hereby approved." This stamp of approval reflects the veto power exercised by the International.

In responding to the Barry Declaration, plaintiff has relied almost exclusively on conclusory allegations. Plaintiff has not supplied this court with any tangible evidence, e.g., deposition excerpts or documents, suggesting that the IBEW engaged in affirmative conduct or unreasonably meddled in the Local's affairs with respect to plaintiff and his fair representation claims.

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negotiated by Atkinson and the Imperial County Building and Construction Trades Council, AFL-CIO, with which the Local is affiliated. The contract involved work to be performed on the Ormesa Geothermal Project.

Based upon all of the above, the IBEW's motion for summary judgment on the first cause of action is granted.

B. Second Cause of Action: Prima Facie Tort, or Blacklisting, and Ninth Cause of Action: Intentional Infliction of Emotional Distress

The IBEW argues that jurisdiction over these tort claims is preempted by the exclusive jurisdiction of the National Labor Relations Board (NLRB). The IBEW is correct, as the preemptive effect of the NLRA is not altered by plaintiff's characterization of these allegations as state based causes of action. See Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 (9th Cir.) ("Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge."), cert. denied, 439 U.S. 930 (1978).

In Magnuson, the court went on to hold that the complaint did not fit within "the narrow exception to federal preemption" explained in Farmer v. United Brotherhood of Carpenters & Joiners, Local 25, 430 U.S. 290

(1977). Magnuson, 576 F.2d at 1369. Preemption will not apply if the wrongful conduct is "a merely peripheral concern" of federal law, and affects interests which are "deeply rooted in local feelings and responsibility." Farmer, 430 U.S. 296 (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959)). In Magnuson, the Ninth Circuit concluded, "Unlike Farmer, this action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A." Magnuson, 576 f.2d at 1369 (emphasis supplied).

In this case, it is clear that plaintiff's allegations are based on a "matrix of facts" which are "inextricably intertwined" with the NLRA. The Farmer exception is "narrow" and was not "a signal that these causes of action for infliction of emotional distress were generally exempted from preemption." Id. Plaintiff will not be permitted to use artful pleading to avoid preemption. Therefore, the IBEW's motion

for summary judgment on the second and ninth causes of action is granted.

C. Third Cause of Action: Violations of § 101 of the Labor-Management Reporting and Disclosure Act (LMRDA)

1. Direct Restrictions Imposed by the IBEW on the Democratic Process

Plaintiff alleges LMRDA violations based upon an IBEW rule which prevented him from running for IBEW convention delegate in 1986. Complaint, para. 175. Under Titles I and IV of the LMRDA, a union may adopt reasonable rules relating to the nominating and elective process. Steel Workers v. Sadlowski, 457 U.S. 102, 111 (1982). However, where an eligibility rule has a "large" undemocratic effect, the rule must serve a valid union interest. Doyle v. Brock, 821 F.2d 778, 785 (D.C.Cir. 1987) (citing Local 3489, United Steelworkers v. Usery, 429 U.S. 305, 310 (1977)).

Plaintiff's application of Doyle and Usery to this case is strained. In those two cases, the court invalidated eligibility provisions which required that candidates attend fifty

percent of union meetings over the last year (Doyle) or three years (Usery). In Doyle, the court noted that both provisions "rendered 97% of the membership ineligible to run for office." Doyle, 821 F.2d at 783 (emphasis supplied).

Because plaintiff falls far short of the anti-democratic showing made in the cases upon which he relies, the deferential standard of Sadlowski applies. Plaintiff has not created a genuine issue of material fact as to the reasonableness of the policy. Therefore, summary judgment is granted to the IBEW as to this portion of the third cause of action.

2. IBEW Liability for Undemocratic Acts of the Local; Agency under the LMRDA

In order to hold the IBEW liable for the misconduct of the Local defendants, plaintiff must demonstrate that the IBEW ratified the Local's conduct. Rodonich v. House Wreckers Union Local 95, 817 F.2d 967, 973-74 (2nd Cir. 1987). In Rodonich, the Second Circuit held that "ratification would occur if [the international] affirmed the discipline imposed

on plaintiffs with full knowledge that it was part of an overall scheme to suppress dissent in violation of the LMRDA." Id. at 974. The court concluded that ratification did not occur, even though the International affirmed the decisions of the Local trial board against plaintiffs. Id.

Under Rodonich, plaintiff has not created a genuine issue of material fact with respect to ratification.[4] Therefore, to the extent plaintiff's LMRDA claims seek to impose broad agency liability on the IBEW, the motion for summary judgment on the third cause of action is granted.

3. Building Trades Assessment

The IBEW asserts that count 5 is moot because the alleged violation was corrected by

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4 Plaintiff's citation to Aguirre v. Automotive Teamsters, 633 F.2d 168, 170 (9th Cir. 1980) is unpersuasive, as that decision considered agency principles with respect to union officers and the local union, not the local and the International. Although the International was also a defendant in Aguirre, the discussion does not implicate the concept of local-international agency.

a second ballot which was secret, and because plaintiff received a refund of the amount that Local No. 569 improperly collected from him. See McCann Declaration, Attachments 6, 16.

However, plaintiff makes credible allegations that the purportedly corrective vote was also taken in violation of the LMRDA. Specifically, plaintiff alleges: (1) there were not two readings at two separate union meetings as required by Local 569's bylaws and the notice requirements of the LMRDA; (2) there was no mention of any retroactive effect; and (3) non-affected members voted. Moore Declaration, para. 15.

Because plaintiff's allegations raise genuine issues of material fact as to the validity of the second vote and the IBEW's role in its administration, the motion for summary judgment on count five of the third cause of action is denied. Accordingly, count five constitutes the only surviving allegation of the third cause of action against the IBEW.

D. Seventh Cause of Action: Breach of Contract

This court has jurisdiction under § 301(a) of the LMRA over a suit brought by a union member against an international union for violation of the union constitution. Kinney v. Int'l Brotherhood of Elec. Workers, 669 F.2d 1222, 1229 (9th Cir. 1982). The individual IBEW defendants argue that no provision of the IBEW Constitution creates contractual liability. Plaintiff cites Article XXII, Section 3, and Article XXVII, Section 1, of the IBEW Constitution. See Complaint, para. 231. The court finds that triable issues of fact remain as to the liability of the individual IBEW defendants under the relevant articles, and the vicarious liability of the IBEW for the conduct of those individual defendants.5

5 The IBEW's reliance on Teamsters Local 420 v. Traweek, 867 F.2d 500, 508, is misplaced. In Traweek the Ninth Circuit only considered a suit against two non-officer members, where the plaintiffs eschewed the internal grievance process. In finding that the district court did not have subject matter jurisdiction, the court in Traweek did not foreclose suits for declaratory relief against union officers in their official capacities, as in this case.

E. Eighth Cause of Action: Violation of § 609 of LMRDA

Section 609 of the LMRDA states that it shall be unlawful for any labor organization "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter." The phrase "otherwise discipline" refers "only to actions 'undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership.'" Breininger v. Sheet Metal Workers Intern., 110 S.Ct. 424, 439 (1989) (quoting Miller v. Holden, 535 F.2d 912, 915 (5th Cir. 1076)).

In this case, the IBEW asserts that plaintiff is only charging individual retaliation, as opposed to the improper use of the union's formal discipline machinery. However, plaintiff's eighth cause of action does not refer to ad hoc retaliation, but instead to official conduct which led to his suspension and expulsion. TAC, para 249.

Therefore, the motion for summary judgment on the eighth cause of action is denied.

IV. Local 569's Motion for Summary Judgment

A. First Cause of Action: Duty of Fair Representation

1. Count 1: The Hiring Hall

In count 1, plaintiff charges a variety of breaches of the duty of fair representation which relate to Local 569's administration of the hiring hall.

a. Short Call Abuse

Local 569 alleges that this claim is barred by the six month statute of limitations applicable to fair representation claims, as contained in § 10(b) of the LMRDA. See Conley v. IBEW Local 639, 810 F.2d 913, 915 (9th Cir. 1987) (applying six month statute to fair representation claims involving hiring hall). Since plaintiff filed his only charge on this issue with the NLRB in June, 1985, defendants posit that the claim accrued well before the complaint was filed in February, 1987.

However, plaintiff raises a triable issue

of material fact with respect to Local 569's alleged continuing wrongful administration of the out-of-work list (List). See Moore Declaration, para. 25, 26. Although plaintiff filed one formal complaint in June, 1985 on this issue, that fact alone does not signify necessarily that the conduct itself ceased. Accordingly, the short call charges are not time barred.

b. Removal of Plaintiff from the List in May, 1987

Defendants argue that plaintiff's removal was performed with reference to objective, non-discriminatory criteria. Smith Declaration, para. 22 (removal on this basis not unusual); Exhibit I (removal of Conrad Mollar for same reason). Moreover, defendants note that plaintiff himself had previously filed charges against other members in which he alleged double-booking, and thus was aware of the Local's prohibition against the practice.

In his Declaration, plaintiff states, "I know that it is the practice all over the country for union electricians to maintain

their position on their home out of work lists while working out of town." Moore Declaration, para. 24. In light of this declaration, the court finds that the removal of one other electrician does not prove that the policy was uniformly applied. Because the declarations are in direct conflict, there is a genuine issue of material fact as to whether this policy uniformly existed at the time plaintiff was removed, and summary judgment is inappropriate on these charges.

c. Required Registration in Group II in May or June, 1987

By his Declaration, plaintiff has established an issue of material fact as to whether this relegation was retaliatory and based upon his practice of printing individual defendants' salaries and expense accounts in his dissident union newsletter.

d. Transfer of George England

Local 569 asserts that an electrician may be transferred from one employer to another, without going back on the List, if the electrician possesses "special skills" and the

Local approves the transfer. According to the Local, England had detailed knowledge of the work being performed at Berg Electric, and thus had the "special skills" required for a transfer when the work being performed at Berg was moved to Chula Vista Electric by the general contractor.

However, the Tarleton Declaration indicates that Tom Tarleton worked on the Chula Vista job with England, and [t]hė job was ordinary electrical work and required no special skills." Tarleton Declaration, para. 8. Accordingly, a genuine issue of fact exists as to the alleged "back-dooring" of England.

e. Sound Book Claim

Plaintiff recovered $43,156.31 in damages in the first trial, as the jury found that the Local breached its duty of fair representation by failing to notify plaintiff that he could remain on the List while working under the Sound Agreement. The doctrine of claim preclusion bars all grounds for recovery which could have been asserted, whether they were or

not, in a prior suit between the same parties on the same cause of action. McClain v. Apodaca, 793 F.2d 1031 (9th Cir. 1986).

Plaintiff's response to this argument is unpersuasive. Plaintiff offers no authority suggesting that disappointment with the size of a jury's verdict allows a claim to be brought against the same defendant twice. Accordingly, summary judgment should be granted on the sound book claim.

Based upon all of the above, the Local's motion for summary judgment on count one is denied except with respect to the sound book claim, upon which summary judgment is granted.

2. Counts 2 and 3: Grievance Against Atkinson

In resisting summary judgment on these counts, plaintiff relies on his allegations of collusion between Atkinson and the Local. Moore Declaration, para. 8, 9, and 10. Most importantly, plaintiff has provided telephone records which show that Richard White was communicating with the Local while plaintiff was driving to the Atkinson job site in the

Imperial Valley. While defendants portray these calls as "routine," their existence, coupled with the deposition testimony cited by plaintiff in para. 9 and 10 of his declaration, establish facts upon which a reasonable jury could base a verdict in plaintiff's favor. Accordingly, summary judgment is denied on counts two and three.

3. Count 4: Ratification of Collective Bargaining Agreements

In the context of the collective bargaining process, the duty of fair representation is breached only if the disputed union procedures are wholly irrational or arbitrary. Airline Pilots Association v. O'Neill, ___ U.S. ___, 91 DAR 3211, 3214 (March 19, 1991). According to Local 569, since the mail ballot was conducted in accordance with the IBEW Constitution and for a legitimate union interest, this claim must be dismissed as a matter of law. However, plaintiff's countervailing evidence establishes sufficient irregularity to create a genuine issue of material fact. Moore Declaration, para. 27

(ruling by Robbins concerning return addresses).

With respect to plaintiff's charges concerning the 1987 amendment to the prior Agreement, there is also a triable issue of fact. Even if Barry properly delegated the authority to implement the amendment, the court is not convinced that the delegates exercised it properly. Accordingly, the motion for summary judgment on count 4 is denied.

4. Count 5: Derogation of Work Status

This count refers to plaintiff's most recent derogation, when defendant Pridemore put him on Group II after he re-signed the List in January, 1990. Plaintiff has raised an issue of fact as to whether the assignment to Group II was retaliatory. Most importantly, plaintiff alleges that he did not have the requisite experience for Group I because he had been kept out of work by defendants' allegedly discriminatory practices in the last four years. Therefore, Local 569's motion for summary judgment on count 5 is denied.

5. Count 6: F & M's Transfer Policy

Plaintiff originally complained about F & M's transfer policy on March 1, 1988. Defendants assert that under the six month statute of limitations, plaintiff's complaint can only reach back to October 1, 1987. Therefore, defendants argue that plaintiff must show damage between October 1, 1987, and the cessation of the transfer policy, which he cannot do because he was not even on the List during this period.

At the hearing, the court requested additional factual briefing on the standing issue, and this aspect of the Local's motion for summary judgment is accordingly taken under submission.[6]

B. Second Cause of Action: Prima Facie Tort, or Blacklisting, and Ninth Circuit Cause of Action: Intentional Infliction of Emotional Distress

Like the IBEW, the Local defendants argue

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6 The standing issue is also the basis of a new motion to dismiss filed by F & M. See supra n.1.

that these claims are preempted by the LMRA. However, while the IBEW claimed preemption under § 10(a) of the LMRA, the Local is asserting preemption under § 301 of the LMRA, which is appropriate as Local 569 is a signatory to the collective bargaining agreement at issue.

Under Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211-13 (1985), § 301 preempts any state claims which could only be resolved by reference to a collective bargaining agreement. Where the terms of a collective bargaining agreement govern job security or employment opportunities, any state tort claim intertwined with those provisions is preempted. Jackson v. Southern California Gas Co., 881 F.2d 638, 643 (9th Cir. 1989). This circuit has recently held that the preemptive effect of § 301 is negated only when the right asserted would exist even in the absence of a collective bargaining agreement, e.g., "[t]he nonnegotiable right not to be discharged for filing a workers' compensation [claim] . . .." Eldridge v. Felec

Services, Inc., 920 F.2d 1434, 1438 (9th Cir. 1990).

Under this authority, plaintiff must establish that his claims in the second and ninth causes of action are wholly unrelated to the collective bargaining agreement (Agreement).7 Clearly, each one of plaintiff's allegations relate in some way to the Agreement and the defendants' administration and alleged manipulation of said Agreement. The allegations of blacklisting and emotional distress all have their genesis in improper conduct under the Agreement. Therefore, these claims are preempted.8

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7 Plaintiff's alternative argument, that his blacklisting tort claim may be considered improper "discipline" under the LMRDA, is foreclosed by Breininger, 110 S.Ct. at 440 (informal "blacklisting" and other ad hoc practices do not constitute "discipline" under the LMRDA).

8 Plaintiff is unpersuasive in his discussion of pendent jurisdiction, which does not apply where claims are preempted. Plaintiff's citation to Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993, 999 (9th Cir. 1987), is taken out of context, as the court's decision considered pendent jurisdiction over tort claims in the § 301 context only insofar as

Where claims are preempted by § 310, they must be dismissed unless plaintiff has exhausted his contractual grievance. procedures. Jackson, 881 F.2d at 646. However, the employee "may obtain judicial review of his claim despite his failure to exhaust contractual remedies if he can show that the union breached its duty of fair representation." Id. (citing Vaca v. Sipes, 386 U.S. 171, 185-86 (1967)). Here, there is a genuine issue of material fact as to whether Local 569 breached this duty. See supra pp. 10-15. Therefore, although these claims are preempted by § 301, preemption does not prevent this court from hearing plaintiff's claims. Accordingly, Local 569's motion for summary judgment is denied on the second and ninth causes of action.9

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removal was concerned. Indeed, among the rationale supporting the exercise of pendent jurisdiction was "the significant federal interest in deciding the preemption defense." Id. (emphasis supplied).

9 The court finds that this holding is not inconsistent with the court's holding on the

C. Third Cause of Action: LMRDA Violations

1. Counts 1 and 2: Delegate Election and Publication of Attacks in Newsletter

Local 569 is entitled to summary judgment on the delegate election issue because the rule preventing a member from running for delegate and business manager at the same time is not unreasonable. See supra p. 6. Moreover, with respect to the newsletter claim, there is no right created by statute or otherwise providing a right of rebuttal in union publications. Even if the disputed articles amounted to campaign literature financed by the incumbent regime, this allegation does not suggest that plaintiff was prevented from independently responding, but merely that plaintiff was not

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IBEW's motion for summary judgment on the second and ninth causes of action, as the latter ruling did not implicate the duty of fair representation owed by the Local. Indeed, the court held that the IBEW is not under a duty of fair representation to plaintiff. See supra pp. 3-4. With respect to the IBEW, plaintiff's preempted claims are within the exclusive jurisdiction of the NLRB under § 10(a), and plaintiff has not made any allegations suggesting that his pursuit of grievances under § 10(a) would be futile.

provided free rebuttal space. Accordingly, summary judgment is granted on the delegate election and newsletter claims contained in counts 1 and 2. TAC, para. 175, 176, 184, 185.

2. Count 3: Right to Sue

Despite defendants' characterization of count three as implicating the validity of the 1986 and 1989 elections, the complaint indicates that plaintiff is attempting to vindicate his right to sue. See para. 190, 193. Plaintiff is seeking damages under Title I based upon the alleged infringement of his right to sue, and triable issues of fact remain on that claim. Accordingly, the motion for summary judgment on count 3 is denied.

3. Count 4: Wrongful Discipline

Plaintiff alleges that he was unfairly disciplined by the trial boards convened in January, 1987, November, 1987, and March, 1990. With respect to the first two proceedings, plaintiff's opposition amounts to nothing more than a repeat of his defense to the charges

brought by Charles Morrison. Even assuming that plaintiff was innocent, however, plaintiff has failed to create an issue of fact as to whether the conduct of the trial boards violated his LMRDA Title I rights. It is not for this court to determine the validity of the outcome, but merely whether the outcome was tainted by the procedures used, and whether there was some evidence for the outcome.

In seeking summary judgment of the allegations based upon the March 5, 1990 trial board, defendants contend that plaintiff failed to exhaust his internal appeals. Plaintiff admits that he did not appeal to the IBEW, but argues futility. There is at least a triable issue of fact as to whether an appeal at this stage would have been futile. Accordingly, summary judgment is granted on count 4 only with respect to the first two trial boards.

4. Count 5: Building Trades Assessment

Because plaintiff makes credible allegations concerning the votes taken on this assessment, summary judgment is denied on count

5. See supra pp. 7-8.

D. Fourth Cause of Action: Breach of Fiduciary Duty

Plaintiff has alleged financial improprieties concerning a car auction, paid vacations for union officers, and pension contributions. Local 569's contrary assertions merely join the issues, and do not resolve all issues of material fact. Accordingly, the motion for summary judgment on the fourth cause of action is denied.

E. Sixth Cause of Action: Assault

Again, the dispute between the parties is merely factual. Although Local 569 has submitted declarations assailing plaintiff's allegations, plaintiff has answered with his own submissions. See Moore Declaration, para. 30, 31; Rodman Declaration, para. 6 (threats); Williamson Declaration, para. 7 (Degener pointed gun at plaintiff). While Local 569 is correct in asserting that mere words do not constitute assault, plaintiff has demonstrated that there is an issue of fact as to whether he at least reasonably believed that he was about

to suffer bodily injury, as required by California law. Therefore, summary judgment on the sixth cause of action is denied.

F. Seventh Cause of Action: Breach of Contract versus Individual Union Officers

The court in Traweek did not foreclose suits under § 301 for injunctive and declaratory relief against union officers in their official capacities. See supra n. 5 and accompanying text. Accordingly, the motion for summary judgment on the seventh cause of action is denied.

IT IS SO ORDERED DATED May 2, 1991

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order dismissing plaintiff's objection to order of magistrate judge; denying plaintiff's motion to amend and for class certification; granting defendants' motion for protective order; dismissing plaintiff's notice of default of J.J. Barry; denying defendant Fischbach & Moore's motion for reconsideration; granting in part and denying in part defendant Fischbach & Moore's motion to dismiss.

June 5, 1991

The above captioned matter came on regularly for hearing on May 28, 1991, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona; Lewis N. Levy, Esq., appeared on behalf of defendant Local 569 of the International Brotherhood of Electrical Workers and the individual Local defendants (Local 569); Terry R. Yellig, Esq., and Jennifer T. Messersmith, Esq., appeared on behalf of defendant International Brotherhood of Electrical Workers and the individual International defendants (IBEW); Oscar F. Irwin, Esq., and Craig A. Brown, Esq., appeared on behalf of defendant Fischbach & Moore (F & M); and John C. Nangle,

Esq., appeared for the Department of Labor. Upon consideration of the various motions filed, and the oral argument thereon, the court hereby enters the following order.

I. Plaintiff's Objection to Order of Magistrate Judge

Plaintiff's objection to the order of the Magistrate Judge quashing the subpoena served on the Department of Labor's motion for a protective order, is hereby dismissed. Plaintiff concedes that at the time of the motion before the Magistrate Judge he had not complied with the appropriate regulations. If plaintiff alleges that he has now complied with the regulations, but is still being refused discovery, his proper remedy is a motion to compel before the Magistrate Judge.

II. Plaintiff's Motion to Amend and for Class Certification

Under Fed. R. Civ. Proc. 15, leave to amend "shall be freely given when justice so requires." In deciding whether an amended

complaint should be allowed, this court considers four factors: (1) undue delay; (2) bad faith of the moving party; (3) futility of the amendment; and (4) prejudice to the opposing party. Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973). While all of the factors mitigate against allowing the proposed amendments, the first and fourth factors are particularly compelling on the facts of this four year old case, in which plaintiff has already amended three times. Accordingly, the motion to amend the third amended complaint is hereby denied.

Under Fed. R. Civ. Proc. 23, plaintiff has not met his burden in seeking class certification. Plaintiff has not demonstrated (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Accordingly, the motion for class certification is hereby denied.

III. Defendants' Motion for Protective Order

The notices served by plaintiff on

defendants' counsel are not sufficient to compel the attendance of the parties named therein. In order to compel the attendance of witnesses at trial, plaintiff must comply with Fed. R. Civ. Proc. 45(e)(1), and all other appropriate rules. Where necessary, plaintiff must obtain and use deposition testimony of those witnesses beyond the subpoena power of this court.

IV. Plaintiff's Notice of Default of J.J. Barry

By order entered July 5, 1989, this court dismissed the second amended complaint against defendant J.J. Barry for lack of personal jurisdiction. In so doing, the court did not differentiate between the various causes of action asserted against Barry, but rather ruled globally with respect to all allegations against Barry in the second amended complaint. Because this court lacks personal jurisdiction over Barry, the notice of default filed by plaintiff against Barry is dismissed.

V. F & M's Motion for Reconsideration

By order entered March 26, 1991, this court denied F & M's motion for summary judgment, primarily on the ground that the "finality" doctrine generally applicable to arbitration decisions does not apply in this case. See Order, March 26, 1991, pp. 2-11. In that order, the court also denied the statute of limitations defense asserted by F & M, finding that the period applicable to a breach of contract claim against the employer is four years. In so doing, the court relied primarily on Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966) (where employer breaches collective bargaining agreement, state statute of limitations for breach of contract applies). Cf. DelCostello v. Teamsters, 462 U.S. 151, 161 (1983) (six month statute provided by § 10(b) of the National Labor Relations Act applies).

F & M's motion for reconsideration is based upon Conley v. Int's Brotherhood of Electrical Workers, 810 F.2d 913 (9th Cir. 1987), where the court considered the interplay

between Hoosier Cardinal and DelCostello in cases where a plaintiff sues both the employer and his or her union. The Ninth Circuit concluded that in such "hybrid" cases the six-month statute of limitations provided by § 10(b) should apply.

Under Conley, plaintiff's claim is clearly a hybrid action. Therefore, contrary to the court's earlier ruling, Conley requires an application of the six-month statute of limitations to plaintiff's claim against F & M. Thus, the only question on reconsideration is whether application of the six-month period is fatal to plaintiff's claim against F & M. In a letter dated March 1, 1988, plaintiff states that he "just learned" of F & M's transfer policy. Almour Declaration, Exh. B. Plaintiff's first amended complaint, filed on September 29, 1988, names F & M as a defendant for the first time. Therefore, F & M argues that the claim is time-barred.

However, F & M fails to note that plaintiff filed his motion to amend on May 13,

1988, as reflected in the court docket. Moreover, the official court file contains a lodged copy of plaintiff's first amended complaint, also dated May 13, 1988, which for the first time names F & M as a defendant because of its transfer policy. Therefore, even under the six-month statute of limitations, plaintiff's claim against F & M is not time-barred.[1] Accordingly, the motion for reconsideration is denied, except insofar as the court will apply the six-month statute of limitations to plaintiff's hybrid claims.

VI. F & M's Motion to Dismiss for Lack of Standing

On April 1, 1991, this court requested additional briefing on the issue of plaintiff's standing to sue F & M. Plaintiff was

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1 F & M also notes that plaintiff, by letter dated November 11, 1987, complained about the transfer of certain employees from F & M to Dynalectric. However, this charge reflects plaintiff's dissatisfaction with an isolated transfer, and does not suggest knowledge or notice of the transfer policy of F & M as is related to Corbin-Dykes. It is that policy which forms the basis of the fifth cause of action.

terminated from F & M on May 8, 1986, and was returned to the out-of-work list (List). On May 4, 1987, plaintiff's name was removed from the List, allegedly because he was "double-booking," i.e., working in another district while maintaining his position on Local 569's List. From the date of his removal, plaintiff lacks standing to assert his breach of contract claim against F & M, as plaintiff was not available for hiring after his removal from the List. While that removal may constitute a breach by the Local of its duty of fair representation, see Order, May 2, 1991, pp. 10-11, it was not accomplished with the complicity of F & M. Accordingly, F & M cannot be held accountable for breach of contract after May 4, 1987.

With respect to the period between May 8, 1986, and may 4, 1987, the evidence presented to the court indicates that plaintiff was on the List in a position where he was eligible to accept calls on those dates when F & M transferred to Corbin-Dykes. See Almour

Declaration, Exh. C; Pridemore Declaration, Exh. A; Brownfield Declaration, Exh. A. However, on each of the relevant dates plaintiff passed on calls which were made available to him by other employers. Almour Declaration, Exh. A. From this evidentiary fact, F & M concludes that plaintiff would also have rejected any calls to work for Corbin-Dykes, had such calls been made.

The court declines to accept this interpretation. Plaintiff's reluctance to accept some calls, or even all calls, does not necessarily mean that he would have passed on a call from Corbin-Dykes during the relevant time frame. Accordingly, the motion to dismiss is denied with respect to the period between May 8, 1986 and May 4, 1987.

IT IS SO ORDERED. DATED: June 5, 1991

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order re motions for reconsideration and motions in limine.

July 16, 1991

The above captioned matter came on for hearing on June 6-7, and June 11, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona; Lewis N. Levy, Esq., appeared on behalf of defendant Local 569 of the International Brotherhood of electrical Workers and the individual Local defendants (Local 569); Terry R. Yellig, Esq., appeared on behalf of defendant International Brotherhood of Electrical Workers and the individual International defendants (IBEW); Oscar F. Irwin, Esq., and Craig A. Brown, Esq., appeared on behalf of defendant Fischbach & Moore (F & M). Upon consideration of the various motions filed, and the oral argument thereon, the court hereby enters the following order.

I. Plaintiff's Motion for Reconsideration

Plaintiff's motion for reconsideration amounts to nothing more than reargument of issues already passed upon by this court. Because the court finds no good cause for reconsidering its previous rulings granting partial summary judgment to the IBEW and the Local, plaintiff's motion is hereby denied in its entirety.

II. IBEW's Motion for Reconsideration

A. Third Cause of Action, Count 5: LMRDA Violations (Building Trades Assessment and Proposed Bylaw Amendments)

In count 5 of the third cause of action, plaintiff alleges irregularities in the voting procedures used to ratify a building trades assessment against the members. Moreover, plaintiff alleges in count 5 that he was unlawfully prevented from presenting and supporting five proposed bylaw amendments to the membership. The court previously granted summary judgment to the IBEW on all counts of plaintiff's third cause of action except for

count 5. See Order, May 2, 1991, pp. 6-8.

With respect to the increase in the building trades assessment, the court is now convinced that plaintiff does not state a cause of action under the LMRDA for this alleged violation. While the IBEW concedes that the second, purportedly corrective vote on the increase was ordered by IBEW Vice-President McCann and IBEW Representative Robbins, the court finds that the allegedly unlawful procedures employed in conducting said vote were created, directed, and administered by Local officials.

In conformance with this court's earlier rulings, see Id. at p. 7, this court will not impose broad agency liability on the IBEW. Plaintiff has offered no credible evidence suggesting ratification by the IBEW of the Local's allegedly unlawful administration of the second vote. Accordingly, summary judgment is granted to the IBEW on the building trades assessment element of count 5 of the third cause of action.

Similarly, the court is also satisfied that summary judgment is appropriate with respect to plaintiff's allegations concerning the IBEW's role in consideration of his five proposed bylaw amendments. First, although plaintiff was initially prevented from reading the proposed bylaw amendments at two membership meetings, it is undisputed that IBEW President Barry personally remedied this conduct by directing IBEW Vice-President McCann to order Local 569 to permit the proposed amendments to be lawfully considered by the membership, and three were passed.1 Accordingly, the court finds that this episode does not provide a cause of action against the IBEW under the LMRDA.

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1 The court recognizes that by the time the proposed amendments were considered, plaintiff had been suspended from the Local based upon unrelated internal union charges. However, the court is unaware of any authority suggesting that a union member has a personal right to champion or sponsor a proposed bylaw amendment which is otherwise lawfully considered, voted upon, and passed. The court reserves comment on the issue which would arise if plaintiff's suspension had simultaneously caused the removal of his proposed amendments from any consideration whatsoever by the membership.

Second, only one of the three bylaw amendments passed by the membership involved dues, thereby potentially implicating § 101(a)(3) of the LMRDA. Specifically, the subject amendment provided for a decrease of the IBEW's percapita tax, and was vetoed by IBEW President Barry pursuant to his authority under the IBEW Constitution. Based upon the IBEW's citation to the legislative history, and plaintiff having failed to provide any contrary authority, this court concludes that § 101(a)(3) applies only to dues increases unilaterally imposed by union officials. Here, by contrast, plaintiff's complaint focuses on Barry's veto of a dues decrease. In other words, Barry's veto protected the present dues structure, as opposed to forcing an increase on the members. Therefore, the court concludes that summary judgment should be granted in the IBEW's favor with respect to this veto. Third, the veto by IBEW President Barry of the remaining two bylaw amendments was not unreasonable and was within

his authority under the IBEW Constitution.[2] Accordingly, summary judgment is granted to the IBEW on any claims arising from Barry's veto of these two amendments.

B. Seventh Cause of Action: Breach of Contract

As discussed above, any alleged improprieties associated with the second vote on the building trades assessment do not implicate the IBEW. Moreover, IBEW President Barry acted within his constitutional authority in refusing to approve the three bylaw amendments proposed by plaintiff and approved by the membership. Accordingly, these allegations do not give rise to a cause of action for breach of the IBEW Constitution.

However, summary judgment is not appropriate with respect to the IBEW's alleged failure to "pass upon and determine" plaintiff's charges against Local officers.

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2 These amendments involved vacation time for certain union officers and written notice for union meetings in which collective bargaining agreement proposals would be discussed.

See IBEW Constitution, Art. 27, § 9. If the court were to accept the narrow interpretation of this section offered by the IBEW, then the IBEW would enjoy de facto sovereign immunity for any and all action it takes, or refuses to take, in responding to a union member's charge, no matter how egregious such action or inaction may be.[3] The plain language of Article 27 requires the court reject this interpretation. Instead, plaintiff shall be permitted to attempt to prove to the jury that the IBEW breached its own Constitution by refusing to investigate and consider his charges in good faith.[4]

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3 Reducing the argument to its most obvious hypothetical level, the IBEW would have the court believe that no actionable breach of contract would occur if the International Vice-President, in the course of fulfilling his duties under Article 27, § 9, conducted a completely fraudulent investigation of a member's charges against a local officer. The court simply cannot accept this result.

4 If plaintiff can demonstrate collusion between the IBEW and the Local with respect to his internal charges, then those facts may give rise to additional causes of action against the IBEW.

C. Eighth Cause of Action: Violation of § 609 of the LMRDA

Upon reconsideration of the facts surrounding this cause of action as it relates to the IBEW, the court concludes that summary judgment should have been granted in the IBEW's favor. To the extent plaintiff alleges discipline of the type recognized under Breininger v. Sheetmetal Workers, 110 S.Ct. 424 (1989), this cause of action lies against the Local, not the IBEW.

Based upon all of the above, plaintiff shall proceed to trial against the IBEW on the seventh cause of action only, as more specifically described above.

III. Statute of Limitations on Breach of Contract Claim

The court has previously ruled that it would apply a six-month statute of limitations to plaintiff's breach of contract claim against F & M. See Order, June 5, 1991, p. 4 (citing Conley v. Int'l Brotherhood of Electrical Workers, 810 F.2d 913 (9th Cir. 1987)). The

court concludes that this time bar applies only to plaintiff's filing of the complaint after discovery of the wrongful conduct. In other words, the six month period runs forward from the date of discovery, preventing unjust delay once a plaintiff discovers a claim.5

Contrary to the assertions of defendants, however, the six-month period does not also reach back from the date of discovery, thereby limiting a plaintiff to six months worth of damages. If defendants' position were correct, then a completely reasonable and justified failure to discover a contractual breach would bar a plaintiff from recovering his lawful damages for more than a six-month period in all cases. This is clearly not the state of the law. Rather, a plaintiff who satisfies the statute with respect to the filing of the complaint is not barred by the same statute from reaching back to sue for breaches which occurred more than six months prior to

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5 The court has already ruled that plaintiff filed his complaint in a timely fashion. Order, June 5, 1991, pp. 4-5.

discovery.

IV. Local 569's Motions in Limine

A. Reference to 1986 and 1989 Elections

Because the propriety of these elections has already been litigated, plaintiff is precluded from attacking their validity in this trial. Plaintiff shall not refer to these elections as tainted, illegal, or otherwise improper. This court considers Judge Enright's prior orders, which certified the results of the 1986 and 1989 elections, as final judgments barring plaintiff from attacking the validity of said elections.

B. Reference to Disposition of Civil No. 85-1719-B

Plaintiff shall not refer to the verdict or jury award in Civil No. 85-1719-B, except insofar as plaintiff is prosecuting a cause of action against the Local based upon alleged retaliation against him due to said verdict and award.

C. Medical Exam

The results of the medical test conducted

by defendants' physician shall be admissible with respect to plaintiff's claims for emotional distress, assuming all evidentiary requirements are met.

D. References to January, 1987 and November, 1987 Trial Boards

Because the court has previously granted the Local summary judgment with respect to these trial boards, plaintiff shall not refer to them as tainted or otherwise unlawful.

E. Practices of Other Local Unions

Evidence concerning the practices and conduct of other local unions shall be inadmissible under Fed. R. Ev. 404(b).

V. Fischbach & Moore's Motions in Limine

With respect to plaintiff's claim for breach of the Inside Agreement against F & M, plaintiff shall not comment on any alleged collusion between the IBEW and/or Local defendants and F & M. In addition, plaintiff shall not comment on the debarment of F & M from any federal contract work. Even assuming arguendo that plaintiff's theories concerning

motive are correct, the fact remains that motive is not an element of a breach of contract claim against an employer. The court intends this prohibition to be broad in its reach, and plaintiff is urged to refrain from attempting to devise clever or subtle mechanisms designed to place any such evidence or commentary before the jury.

VI. Plaintiff's Motions in Limine

Plaintiff's motions in limine are denied without prejudice to the extent they become relevant during trial. The court i ruling in this manner because it cannot infer from plaintiff's conclusory arguments any valid reason for excluding any of the subject evidence.

VIII. General In Limine Rulings

In response to certain general evidentiary and procedural matters raised by the parties and not discussed above, the court hereby enters the following rulings: (1) the court

shall conduct all voir dire; (2) evidentiary disputes arising out of alleged discovery failures or witness list omissions shall be handled on an objection by objection basis, but time charges shall be imposed against the losing party; (3) events which occurred after July, 1985 and were not litigated in the first trial shall be admissible in this trial to the extent they are otherwise relevant.

IT IS SO ORDERED. DATED: July 16, 1991

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ORDER DENYING FISCHBACH & MOORE'S MOTION FOR SUMMARY JUDGMENT

Nunc Pro Tunc to July 19, 1991

Filed August 7, 1991

After three days of trial in the above captioned matter, the evidence presented by plaintiff indicated that the cause of action against defendant Fischbach & Moore (F & M) may be vulnerable to summary adjudication pursuant to Bowen v. United States Postal Service, 459, U.S. 212 (1983). Upon consideration of this proposition, and the oral argument thereon, the court orally granted summary judgment in favor of F & M. However, upon further consideration of the issue, the court hereby rescinds its oral ruling and denies F & M's motion for summary judgment.

In Bowen, plaintiff Bowen was terminated from his position with the United States Postal Service (Service) after an altercation with another employee. Id. at 214. Although Bowen

filed a grievance with his union contesting his termination, the union declined to take his grievance to arbitration. Id. Now dissatisfied both with his employer and his union, Bowen filed suit in district court alleging unlawful termination against the Service and a breach of the duty of fair representation against the union. Id.

With respect to the apportionment of damages as between the Service and the Union, the Court held:

> It is true that the employer discharged the employee wrongfully and remains liable for the employee's backpay. The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunction resulting in an increase in the employee's damages. Even though both the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the damages

Id. at 223 (citation and footnote omitted).

In so holding, the Court created an apportionment rule pursuant to which the employer is responsible only for those damages

incurred by the employee through the date of the arbitration award which would have occurred had the union pressed the employee's case in good faith. The union is responsible for the increased damages which are incurred from the date of the tainted arbitration decision through judgment in the district court.

In explaining the rationale underlying its ruling, the Court stated, "Just as a nonorganized employer may accept an employee's waiver of any challenge to his discharge as a final resolution of the matter, so should an organized employer be able to rely on a comparable waiver by the employee's exclusive representative." Id. at 226.

Applying this rationale to the instant matter, the court was concerned that Local 569's acquiescence in F & M's transfer policy, prior to the raising of any complaint by plaintiff, constituted the type of "waiver" discussed above. If this interpretation were correct, the employer would be absolved from all liability, and plaintiff's cause of action

would stand only against his union.

However, Bowen explicitly recognized that "this is not a situation in which either the union or the employer has participated in the other's breach." Id. at 223, n.11 (citing Vaca v. Sipes, 386 U.S. 171, 197 n.18). In the passage cited from Vaca, the Court, relying on relevant N.L.R.B. authority, noted that in such situations the employer and the union would be held jointly and severally liable.

As this language clearly indicates, Bowen does not wholly excuse an employer's breach of the collective bargaining agreement, even where the union participated in or endorsed the breach. Instead, Bowen and its "waiver" discussion apply only in the context of post-grievance liability apportionment. Because this is a case in which the employer and the union concede that the transfers were made with the union's approval, the employer and the union are jointly and severally liable for any § 301 breaches arising out of the transfer policy prior to the arbitration decision. This

analysis assumes that plaintiff can prove that the arbitration decision was tainted by the Local's breach of the duty of fair representation.

Accordingly, F & M's motion for summary judgment is hereby denied.

IT IS SO ORDERED DATED: AUGUST 2, 1991

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Findings of Fact and Conclusions of Law, Judgment on Court Trial and Judgment on Special Verdict - March 18, 1992

This case came on regularly for trial on July 16, 1991. Jury verdicts on bifurcated issues were returned on July 24, 1991 and August 22, 1991. Remaining non-jury issues were tried on January 28 and 29, 1992. Plaintiff appeared as his own attorney. Louis Levy, Esquire appeared for Defendant Local 569 and Terrence Yellig, Esquire appeared for Defendant IBEW.

On the first bifurcated jury trial against Local 569 IBEW only, the jury found in favor of defendant and against plaintiff on Count Six of plaintiff's First Cause of Action alleging Breach of the Duty of Fair Representation in connection with the Fischback & Moore, Inc. to Corbin Dykes Company.

On the second bifurcated jury trial, immediately following the first verdict and

before the same jury, the jury returned answers to special questions covering all remaining jury trial causes of action not previously removed by pre-trial Orders of the Court as follows:

We, the Jury in the above-entitled action, find on each of the questions submitted to us, as follows:

Question No. 1.

Has plaintiff proved by a preponderance of the evidence that Local 569 violated its duty of fair representation towards plaintiff by acting in an arbitrary, discriminatory, or bad faith manner, by encouraging, suggesting, or requesting plaintiff's rejection from employment with Atkinson Mechanical Contractors on or about October 24, 1986?

Please answer "Yes" or "No."

Answer: No .

If you answered Question No. 1 "No," do not answer Questions No. 2 or No. 3, but go directly to Question No. 4. If you answered Question No. 1 "Yes," please answer the next

question.

Question No. 2.

Has plaintiff proved by a preponderance of the evidence that he has sustained any injury or economic damage as a legal result of the actions you have found by the Local 569 in Question No. 1?

Please answer "Yes" or "No."

Answer: _____.

If you answered Question No. 2 "No," do not answer No. 3, but go directly to Question No. 4. If you answered Question No. 2 "Yes," please answer the next question.

Question No. 3.

What injury or economic damage has plaintiff proved by a preponderance of the evidence?

Answer: $_____.

Question No. 4.

Has plaintiff proved by a preponderance of the evidence that the Local 569 violated its duty of fair representation towards plaintiff in an arbitrary, discriminatory or bad faith

manner, when it removed plaintiff from the out-of-work list after receiving a written complaint from another member of Local 569, Gary Degener, alleging that plaintiff was working outside the contractual jurisdiction area of Local 569?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question No. 4 "No," do not answer Questions No. 5 or No. 6, but go directly to Question No. 7. If you answer Question No. 4 "Yes," please answer the next question.

Question No. 5.

Has plaintiff proved by a preponderance of the evidence that he sustained injury or economic harm as a legal result of Local 569's action described in Question No. 4 above?

Please answer "Yes" or "No."

Answer: Yes .

If you answer Question No. 5 "No," do not answer Question No. 6, but go directly to Question No. 7. If you answered Question No.

5 "Yes," please answer the next question.

Question No. 6.

What damages for injury or economic harm has plaintiff proved he sustained as a legal result of Local 569's action described in Question No. 4 above?

Answer: $ 26,400.00 .

Question No. 7.

Has plaintiff proved by a preponderance of the evidence that Local 569 violated its duty of fair representation by arbitrarily, discriminatorily or in bad faith demoting him from Group No. 1 to Group No. 2 in May, 1987?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question No. 7 "No," do not answer Question No. 8 or No. 9, but go directly to Question No. 10. If you answered Question No. 7 "Yes," please answer the next question.

Question No. 8.

Has plaintiff proved by a preponderance of the evidence that Local 569's demotion from

Group No. 1 to Group No. 2 was a legal cause of injury or economic harm to plaintiff?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question No. 8 "No," do not answer Question No. 9, but go directly to Question No. 10. If you answered Question No. 8 "Yes," please answer the next question.

Question No. 9.

What amount of damages based upon injury or economic harm has plaintiff proved by a preponderance of the evidence he has sustained as a legal result of Local 569's actions?

Answer: $39,600.00 .

Question No. 10.

Has plaintiff proved by a preponderance of the evidence that defendant International Brotherhood of Electrical Workers (IBEW) breached its Constitution by failing to act on plaintiff's appeal to the IBEW President of the second Trial Board decision suspending and fining plaintiff for wronging union member

Charles Morrison?

Please answer "Yes" or "No."

Answer: No .

If you answered Question No. 10 "No," do not answer Question No. 11 or No. 12, but go directly to Question No. 13. If you answered Question No. 10 "Yes," please answer the next question.

Question No. 11.

Has plaintiff proved by a preponderance of the evidence that the IBEW's breach of the Constitution was a legal cause of any injury or economic harm to plaintiff?

Please answer "Yes" or "No."

Answer: _____.

If you answered "No" to Question No. 11, do not answer Question No. 12, but go directly to Question No. 13. If you answered "Yes" to Question No. 11, please answer the next question.

Question No. 12.

What amount of damages based upon injury or economic harm has plaintiff proved by

a preponderance of the evidence he has sustained as a legal result of the IBEW's action?

Answer: $_____.

Question No. 13.

Has plaintiff proved by clear and convincing evidence that Local 569 violated plaintiff's Labor Management Reporting and Disclosure Act rights by intentionally re-submitting two by-law amendments to the union membership for vote, which had been proposed by plaintiff earlier, at a time when the plaintiff was suspended from attendance to Union membership meetings, and unable to speak in support of his proposed amendments?

Please answer "Yes" or "No."

Answer: Yes.

If you answered "No" to Question No. 13, do not answer Questions No. 14, No. 15, No. 16, or No. 17, but go directly to Question No. 18. If you answered Question No. 13 "Yes, please answer Question No. 14.

Question No. 14.

Do you find nominal damages in favor of Plaintiff as a legal result of Local 569's acts in Question No. 13?

Please annswer "Yes" or "No."

Answer: Yes .

If you answered "No" to Question NO. 14, do not answer Question No. 15, No. 16 or No. 17, but go directly to Question No. 18. If you answered "Yes" to Question No. 14, please answer Question No. 15.

Question No. 15.

What amount of nominal damages do you find in plaintiff's favor against Local 569 as a legal result of its acts of Question No. 14?

Answer: $ 500.00 .

Question No. 16.

Has plaintiff proved by clear and convincing evidence that the Local 569's conduct described in Question No. 13 was motivated by ill will or a purpose to harm plaintiff's interest?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question No. 16 "No," do not answer Question No. 17, but go directly to Question No. 18. If you answered Question No. 16 "Yes," please answer Question No. 17.

Question No. 17.

What amount of punitive damages has plaintiff proved by clear and convincing evidence against Local 569?

Answer: $ 2,000.00 .

Question No. 18.

Has plaintiff proved by clear and convincing evidence that defendant Local 569 violated his Labor Management Reporting and Disclosure Act rights in its handling of the first Trial Board on the Charles Morrison complaint for any or all of the following respects:

1) Failure to serve on plaintiff specific written charges?

Answer "Yes" or "No."

Answer: No .

2) Failure to give plaintiff a reasonable time to prepare for the hearing?

Answer "Yes" or "No."

Answer: No .

3) Failure to accord plaintiff a full and fair hearing?

Answer "Yes" or "No."

Answer: No .

If you answered "No" to all of the above questions, do not answer Questions No. 19, No. 20, No. 21, or No 22, but go directly to Question No. 23. If you answered Question No. 18 "Yes" as to one or more of the sub-parts, please answer Question No. 19.

Question No. 19.

Has plaintiff proved by clear and convincing evidence that he sustained any injury or economic harm as a legal result of the acts you found in Question No. 18 above?

Please answer "Yes" or "No."

Answer: _____.

If you answered "No" to Question No. 19, do not answer Questions No. 20, No. 21, or No. 22, but go directly to Question No. 23. If you answered "Yes" to Question 19, please go to the

next question.

Question No. 20.

What amount of damages do you find by clear and convincing evidence plaintiff has sustained for injury or economic harm as a legal result of the conduct you found committed by Local 569 in Question No. 18 above?

Answer: $_____.

Question No. 21.

Has plaintiff proved by clear and convincing evidence that Local 569's conduct described in Question No. 18 above was motivated by ill will or a purpose to harm plaintiff's interests?

Please answer "Yes" or "No."

Answer: _____.

If you answered Question No. 21 "No," do not answer Question No. 22, but go directly to Question No. 23. If you answered Question No. 21 "Yes," please answer the next question.

Question No. 22.

What amount of punitive damages do you find in favor or plaintiff and against Local

569 as a legal result of the conduct you found in Question No. 18 above?

Answer: $_____.

Question No. 23.

Has plaintiff proved by clear and convincing evidence that defendant Local 569 violated his Labor Management Reporting and Disclosure Act rights in its handling of the second Trial Board on the Charles Morrison complaint in any or all of the following respects:

1) Failure to serve on plaintiff specific written charges?

Answer "Yes" or "No."

Answer: No.

2) Failure to accord plaintiff a full and fair hearing?

Answer "Yes" or "No."

Answer: Yes.

If you answered "No" to both of the above two questions, do not answer Questions No. 24, No. 25, No. 26 or No. 27, but go directly to Question No. 28. If you answered

Question No. 23 "Yes" as to one or more of the sub-parts, please answer Question No. 24.

Question No. 24.

Has plaintiff proved by clear and convincing evidence that he sustained any injury or economic harm as a legal result of the acts you found in Question No. 23 above?

Please answer "Yes" or "No."

Answer: Yes .

If you answered "No" to Question 24, do not answer Questions No. 25, NO. 26 or No. 27, but go directly to Question No. 28. If you answered "Yes" to Question 24, please answer Question No. 25.

Question No. 25.

What amount of damages do you find by clear and convincing evidence plaintiff has sustained for injury or economic harm as a legal result of the conduct you found committed by Local 569 in Question No. 23 above?

Answer: $ 0 .

Question No. 26.

Has plaintiff proved by clear and

convincing evidence that Local 569's conduct described in Question No. 23 above was motivated by ill will or a purpose to harm plaintiff's interests?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question 26 "No," do not answer Question No. 27, but go directly to Question No. 28. If you answered Question No. 26 "Yes," please answer the next Question No. 27.

Question No. 27.

What amount of punitive damages do you find in favor of plaintiff and against Local 569 as a legal result of the conduct you found in Question 23 above?

Answer: $ 500.00 .

Question No. 28.

Has plaintiff proved by clear and convincing evidence that defendant Local 569 violated his Labor Management Reporting and Disclosure Act rights in its handling of the third Trial Board resulting in plaintiff's six-

year expulsion and $6,000 fine in any or all of the following aspects?

1) Failure to serve on plaintiff specific written charges:

Answer "Yes" or "No."

Answer: Yes .

2) Failure to give plaintiff reasonable time to prepare for the hearing?

Answer "Yes" or "No."

Answer: No .

If you answered "No" to Question No. 28, do not answer Questions No. 29, No. 30, No. 31 or No. 32, but go directly to Question No. 33. If you answered "Yes" to Question No. 28, Please answer Question No. 29.

Question No. 29.

Has plaintiff proved by clear and convincing evidence that he sustained any injury or economic harm as a legal result of the acts you found in Question No. 28 above?

Answer "Yes" or "No."

Answer: Yes .

If you answered "No" to Question 29, do

not answer Questions No. 30, No. 31 or No. 32, but go directly to Question 33. If you answered "Yes" to Question 29, please answer the next Questions No. 30 and No. 31.

Question No 30.

What amount of damage do you find by clear and convincing evidence that plaintiff has sustained for injury or economic harm as a legal result of the conduct you found committed by Local 569 as presented in Question No. 28 above?

Answer: $ 6,000.00 .

Question No. 31.

Has plaintiff proved by clear and convincing evidence that Local 569's conduct as described in Question No. 28 above was motivated by ill will or a purpose to harm plaintiff's interests?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question 31 "No," do not answer Question 32, but go directly to No. 33. If you answered Question No. 31 "Yes," please

answer the next Question No. 32.

Question No. 32.

What amount of punitive damages do you find in favor of plaintiff and against Defendant Local 569 as a legal result of the conduct you found in Question No. 28 above?

Answer: $ 37,400.00 .

Question No. 33.

Has plaintiff proved by clear and convincing evidence that any or all of the defendants violated their fiduciary duties toward Local 569 by overseeing, allowing, or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569?

Please answer "Yes" or "No."

Answer: Yes .

Question No. 34.

Has plaintiff proved by a preponderance of the evidence that either or both of the following defendants intentionally inflicted severe emotional distress on plaintiff?

	Yes	No
1) Gary Degener	X	-
2) Ron Whitaker	___	X

If you answered Question No. 34 "No as to both defendants, do not answer any further questions, but have your foreperson date and sign this verdict form and return it to the court.

If you answered Question No. 34 "Yes," please answer the next question.

Question No. 35.

Has plaintiff proved by a preponderance of the evidence that he has sustained any injury or economic harm as a legal result of the conduct you found against either or both of the above-named defendants?

Please answer "Yes" or "No."

Answer:

As to Degener: Yes.

As to Whitaker: No.

If you answered Question No. 35 "No" as to both defendants, do not answer any more

questions, but have your foreperson date and sign the verdict form and return it to this court.

If you answered "Yes" as to either of the defendant[s] named above, please answer the next question.

Question No. 36.

What amount of compensatory damages has plaintiff proved by a preponderance of the evidence as to either or both defendants?

Answer: Gary Degener $ 0 .

Ron Whitaker $ 0 .

Question No. 37.

Has plaintiff proved by clear and convincing evidence that either or both of the above-named defendants acted toward plaintiff with malice or oppression?

Answer "Yes" or "No."

Answer: Yes .

If you answered Question No. 37 "No," do not answer any further questions, but have your foreperson date and sign the verdict form and return it to this court.

If you answered Question No. 37 "Yes," please answer the next question.

Question No. 38.

What do you assess against either or both defendants by way of punitive damages?

Answer:

Gary Degener $ 1,500.00 .

Ron Whitaker $ 0 .

DATED: 8/22/91 . Earlene Abeson
FOREPERSON

With respect to the non-jury trial of the three remaining equitable issues, the Court now enters the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. VALIDITY OF LOCAL 569 BUILDING TRADES COUNCIL ASSESSMENT

FINDINGS OF FACT

1. For at least the last 25 years, defendant Local 569 has paid a per capita payment monthly to the San Diego Building Trades Council for each member employed in the construction industry.

2. No evidence was presented as to the original source of authorization for this

payment by the defendant Local 569 to the San Diego Building Trades Council.

3. The International Brotherhood of Electrical Workers (IBEW) is affiliated with the Building and Trades Department of AFL-CIO, and pays a per capita assessment to that department for each IBEW member engaged in the construction industry.

4. The payment by defendant Local 569 is drawn from the general fund of the Local, which in turn is made up of union dues and assessments, within which is a member assessment for all members engaged in the construction trade.

5. By prior order of this Court, plaintiff is not subject to the .50 increase in this assessment which was invalidly assessed by the defendant Local 569 on _____.

CONCLUSIONS OF LAW

1. Plaintiff has failed to prove by a preponderance of evidence that the original assessment, presently in the amount of $1.25

per member per month, violates any by-law, regulation or practice of defendant Local 569.

2. In absence of proof, the Court will not presume irregularity or invalidity of the assessment.

3. Judgment on the San Diego Building Trades Council assessment shall be for defendant Local 569 IBEW and against plaintiff.

B. TRANSMITTER ISSUE

FINDINGS OF FACT

1. The Transmitter is a monthly newspaper published by defendant Local 569 under the editorial policy control of the ex officio Business Manager of the defendant Local 569.

2. The Transmitter has been used during 1986, 1987, 1988, 1989, 1990 and 1991 to publish articles criticizing plaintiff for his views and his actions in filing (and sometimes winning) lawsuits against defendant Local 569 and the IBEW.

3. Since at least 1986, plaintiff has run unsuccessfully for election as Business Manager of Local 569 and is a potential opponent.

4. The monthly articles criticizing plaintiff appear to have political themes as well as themes of conflict over plaintiff's lawsuits and plaintiff's claims of union officers' improper conduct.

5. Plaintiff requested, but has been denied, any space in the Transmitter with which to counter the adverse written campaign carried on against him in the Transmitter.

6. Plaintiff has periodically published his own news circular criticizing the officers of Local 569, and asserting various improprieties and violations of law by management of the Local.

7. Prior to the present office-holders, members had been invited to publish their views in the Transmitter. Plaintiff did not avail himself of that opportunity during those earlier years.

8. The Local's present management uniformly prohibits any access to Transmitter space by any union member.

CONCLUSIONS OF LAW

1. To the extent the Transmitter is being used as a campaign tool of incumbent management, it is a violation of 29 U.S.C. § 481, which falls within the jurisdiction of the Department of Labor in the form of post-election remedies, but not in the U.S. District Court in the first instance.

2. To the extent the Transmitter is being used to criticize a member for the member's criticisms and lawsuits filed against the Local, since it is not done discriminatorily only against plaintiff, and since the Transmitter is uniformly unavailable to any member, plaintiff's denial of access is not being imposed unequally. The Court considers the use of the Transmitter to attack plaintiff to be an abuse of the use of the Transmitter, but it does not seem to be reached by 29 U.S.C. §411(a) or (b). See Murphy v. Intern. Union of Operating Engineers, 774 F.2d 114, 129-132 (6th Cir. 1985), since the denial of access to the Transmitter is uniformly followed. Cf. Knox

County Local v. National Rural Letter Carriers' Ass'n., 720 F.2d 936 (6th Cir. 1984).

3. Judgment against plaintiff will be entered on this issue.

C. RECONSIDERATION OF THE ISSUE WHETHER THE LOCAL 569'S DENIAL OF A MEMBER'S RUNNING SIMULTANEOUSLY FOR THE POSITION OF CONVENTION DELEGATE AND BUSINESS MANAGER

The Court declines to reconsider its prior order granting summary judgment in favor of the defendant Local 569 on the grounds that the policy is a reasonable one to be followed, and the Court should not intrude into internal union affairs in the absence of a violation of established principles of law. See Furniture Moving Drivers v. Crowley, 467 U.S. 526, 539 (1983); Calhoun v. Harvey, 379 U.S. 134, 140 (1964).

NOW, THEREFORE, based on the Jury's Special Verdicts and the Findings of Fact and Conclusions of Law by the Court, and the Court being fully advised in the premises, hereby enters the following:

JUDGMENT

1. Plaintiff is awarded $26,400 plus

costs of suit as damages against Local 569, IBEW on his claim against Local 569, IBEW based upon removal of plaintiff from the out-of-work list after receiving written complaint from Mr. Gary Degener.

2. Additionally, plaintiff is awarded $39,600 plus costs of suit against Local 569, IBEW as damages on his claim based upon demoting plaintiff from Group I to Group II in May, 1987.

3. Additionally, plaintiff is awarded $500 plus costs of suit against Local 569, IBEW on his claim for damages based upon re-submitting by-law amendments earlier proposed by plaintiff to the union membership at a time when the plaintiff was suspended from attendance at union membership meetings.

4. In addition, plaintiff is awarded $2,000 as punitive damages against Local 569, IBEW based upon the same claim.

5. Plaintiff is awarded no damages, compensatory or punitive, on his claim against Local 569, IBEW based upon the jury's finding

of a failure to accord plaintiff a full and fair hearing in the second Trial Board trial on the Charles Morrison complaint; however, it is the judgment of this Court that such Trial Board judgment shall be and is hereby reversed and the fine imposed of $500 shall be and is Ordered returned to plaintiff forthwith with interest according to law.

Although the jury found punitive damages of $500 for this claim, the Court declines to adjudge them as the jury found no compensatory damages upon which to base their award of punitive damages on this claim.

6. Additionally, on plaintiff's claim based on the Third Trial Board resulting in plaintiff's expulsion from Local 569, IBEW and $6,000 fine, judgment is entered for plaintiff and against defendant Local 569, IBEW in the sum of $6,000 compensatory damages, and $37,400 punitive damages.

7. In addition, it is the judgment of the Court that plaintiff be reinstated retroactive to the date of his expulsion, and restored to

all his rights and privileges then accrued to him, and that the defendant Local 569, IBEW credit plaintiff with full payment of all applicable dues to the date of plaintiff's reinstatement.

8. Additionally, the Court enters Declaratory Judgment that defendants violated their fiduciary duties toward Local 569, IBEW by overseeing, allowing, or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569. Court costs of suit are awarded to plaintiff on this claim.

9. Additionally, on plaintiff's claim against Gary Degener, based upon intentional infliction of emotional distress, plaintiff shall recover judgment against defendant Gary Degener the sum of no dollars compensatory damage. Although the jury found punitive damages of $1,500 against defendant Degener, the Court declines to award judgment for any sum of punitive damages in view of the jury's

finding of no compensatory damages sustained by plaintiff arising out of the said conduct by defendant Degener. Court costs are awarded to plaintiff on this claim and against defendant Degener.

10. Judgment is entered in favor of defendant Ron Whitaker and against plaintiff, with costs of suit to said defendant.

11. NOW, THEREFORE, as a result of the above, Judgment shall be entered in favor of the plaintiff Lawrence V. Moore and against Defendant Local 569, IBEW in the total of $72,500 as compensatory damages, and $39,400 as punitive damages, plus plaintiff's costs of suit.

Judgment shall be entered in favor of plaintiff and against defendant Gary Degener but for zero dollars, plus costs of suit to plaintiff.

Judgment shall be entered in favor of defendant Ron Whitaker and against plaintiff Lawrence V. Moore, with costs of suit to defendant Ron Whitaker.

Judgment shall be entered in favor of defendant IBEW and against plaintiff with costs of suit to defendant.

Declaratory judgment shall be entered under the Fourth Cause of action against defendants Paul Blackwood, Wayne Lovin, Jim Westfall, Tom Pridemore, Joe Heisler, Dick Smith, Terry Godshalk, Keith Widdop, George England, Kris Hartnett, Don Withem, Steve Workman, Mike Reilly, John Simpson, Ray Altmeyer, Richard White, Jim Brandon, Sharon Hahn, Bob Riel, Jim Aylsworth and Charles Wilder, declaring that said defendants violated their fiduciary duties toward Local 569, IBEW, by overseeing, allowing or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569, IBEW.

Costs of suit are awarded to plaintiff on this claim.

IT IS FURTHER THE ORDER, JUDGMENT AND DECREE of this Court that, based upon the evidence in this case and the Jury Special

Verdict, the third Trial Board Judgment is reversed and the defendant Local 569, IBEW reinstate plaintiff Lawrence V. Moore to active membership in said union Local 569 and the IBEW, retroactive to the date of expulsion, with restoration of all rights and privileges accrued on the date of expulsion; further that plaintiff be credited with full payment of all dues and assessments which would have been paid during the period of expulsion to the date of his reinstatement.

Costs of suit to the plaintiff on this claim.

Finally, judgment is hereby entered in favor of defendant Local 569 for declaratory relief on the issues of election procedure and use of Transmitter, as set forth in the Findings of Fact and Conclusions of Law herein, and aginst plaintiff Lawrence V. Moore, with defendant's costs of suit incurred on said claims. Dated: March 11, 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE MOORE, Plaintiff-Appellee, v. LOCAL UNION 569 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; PAUL BLACKWOOD; WAYNE LOVIN; JAMES WESTFALL; TOM PRIDEMORE; JOE HEISLER; DICK SMITH; TERRY GODSHALK, et al. Defendants-Appellants.	CA No. 92-55515 DC No. CV-87-172 -RMB(HRM)

LAWRENCE MOORE, Plaintiff-Appellant, v. LOCAL UNION 569 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; PAUL BLACKWOOD; WAYNE LOVIN; JAMES WESTFALL; TOM PRIDEMORE; JOE HEISLER; DICK SMITH; TERRY GODSHALK et al; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; J.J. BARRY; S.R. McCANN; RICHARD ROBBINS; ATKINSON MECHANICAL; FISCHBCH FISCHBACH & MOORE, INC., Defendants-Appellees.	CA No. 92-55517 DC No. CV-87-172 -RMB(HRM)

LAWRENCE MOORE, Plaintiff-Appellee, v. LOCAL UNION 569 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; BILLY SMITH; RAY ALTMEYER; S.R. McCANN Defendants-Appellants.	)	CA No. 93-55381 DC No. CV-87-172 -RMB(HRM) MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Argued and Submitted March 9, 1994
Pasadena, California

WALLACE, Chief Circuit Judge; FARRIS, and KLEINFELD, Circuit Judges:

I. APPEAL BY LOCAL 569

The jury's verdict included the following findings: (1) Local 569 violated its duty of fair representation by removing Moore from an "out of work" list and assigning him a lower hiring preference; (2) Local 569's officers and staff employees breached their fiduciary duties by overseeing pension contributions on their

* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

behalf that violated the union's bylaws; and (3) a disciplinary hearing held on March 5, 1990 violated Moore's right to a full and fair hearing under the LMRDA. On appeal, Local 569 argues that the district court erred in denying its motion for judgment notwithstanding the verdict on the first and third claims, and that we should reverse the jury's verdict on the second claim. The record satisfies us that there is substantial evidence to support the jury's verdicts. We affirm. Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1370-71 (9th Cir. 1987).

A. Duty of Fair Representation

Under Section 9 of the LMRA, 29 U.S.C. 159, a union has a duty of fair representation "'to serve the interests of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" United Steelworkers v. Rawson, 495 U.S. 362, 372 (1990) (quoting Vaca v. Sipes, 386 U.S. 171, 177 (1967)). The duty of fair

representation extends to a union's administration of a hiring hall pursuant to a collective bargaining agreement. Breininger v. Sheet Metal Workers, 493 U.S. 67, 87-90 (1989); NLRB v. Iron Workers Local 433, 600 F.d 770, 773, 776-77 (9th Cir. 1979), cert. denied, 445 U.S. 915 (1980).

Local 569 contends that it removed Moore from the "out of work" list because he was working as an electrician for another IBEW local in different city. Local 569 also asserts that it required Moore to register in a group with a lower priority for job referrals because he had not accumulated sufficient hours of employment with signatory employers to maintain his high priority status. In both instances, Local 569 followed procedures specified by the collective bargaining agreement and the union's bylaws.

However, Moore and four other witnesses testified that Local 569 selectively and arbitrarily enforced its hiring hall rules as part of a campaign to punish him for

challenging the union's leadership. Local 569 mistakenly argues that it could not have breached its duty of fair representation so long as it acted pursuant to the collective bargaining agreement and the union's written policies. A union breaches its duty when it enforces its hiring hall policies against a dissident member in a discriminatory manner. NLRB v. Laborers' Int'l. Union, Local 300, 613 F.2d 203, 207-08 (9th Cir. 1980). Although there is conflicting evidence in the record, a reasonable juror could have credited the testimony of Moore and his witnesses and concluded that Local 569 arbitrarily chose to enforce the rules in Moore's case and ignore them in others.

B. Breach of Fiduciary Duties

When a complaint alleges that a union officer personally benefitted from a labor organization's expenditure, the officer must establish both a valid authorization, after adequate disclosure, and that the expenditure was not manifestly unreasonable. Ray v. Young,

753 F.2d 386, 389-91 (5th Cir. 1985); Morrissey v. Curran, 650 F.2d 1267, 1272-75 (2nd Cir. 1981); cf. Stelling v. IBEW Number 1547, 587 F.2d 1379, 1389 (9th Cir. 1978), cert. denied, 442 U.S. 944 (1979) (deferring to a union officer's interpretation of a union constitution unless the interpretation is "patently unreasonable"). Local 569 failed to satisfy the jury that the membership ever authorized the pension contributions. Local 569 described the process by which the membership authorized the salaries of the local officers and staff employees. But this alone did not establish that the membership authorized the pensions.

C. Improper Discipline Claim and Damage Awards

Under Section 101 (a) (5) of the LMRDA, 29 U.S.C. 411 (a) (5), before a union member may be disciplined (except for non-payment of dues), a union must do three things: (1) serve the member with written, specific charges, (2) give a reasonable time to prepare a defense, and (3) provide a full and fair hearing. 29

U.S.C. 411 (a) (5); Building Material and Dump Truck Drivers, Local 420 v. Traweek, 867 F.2d 500, 510 (9th Cir. 1989). The jury found clear and convincing evidence that Local 569 failed to give Moore written notice of the charges against him as required by Section 101 (a)(5).

Local 569 emphasizes the evidence which indicates Moore might have received the requisite written notice. The union separately mailed--by regular delivery and registered mail--two written notices of the charges and hearing. Moore appeared at the hearing on time, appeared to be aware of the charges, and was prepared to defend himself against the charges. He also declined to request a continuance. Previously, Moore falsely had claimed that he had not received written notice of another disciplinary hearing.

On the other hand, there is evidence to support the jury's finding. Moore testified that he never received any written notice, but learned about the charges and the hearing through other members. He also testified that

he inquired about getting a written copy of the charges prior to the hearing. And Local 569 did not produce a receipt from the registered letter with Moore's signature.

The jury determines matters of credibility. Moore v. Local Union 569 of the IBEW, 989 F.2d 1534, 1546 (9th Cir. 1993). A reasonable juror could have found Moore's testimony credible and found that he had not received written notice.

Local 569 argues that the jury's compensatory damage award of $6,000 was unsupported by the evidence and excessive. In Brett v. Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union, Local 879, 828 F.2d 1409 (9th Cir. 1987), we restated the standard for determining if a jury has awarded excessive damages:

> Absent a total want of evidence on all or certain portions of the case, or the erroneous exclusion . . . of appropriate matters or a showing of bias or prejudice on the part of the jury, this court may not reverse the trial court unless the verdict can be said to be grossly excessive or monstrous . . . .

Id., at 1417 (quotations and cites omitted). Moore described his damages to a jury, as did an accountant who testified as an expert witness for Moore. They testified that Moore was fined $6,000 by the union and that during his suspension, which had lasted for two years at the time of the trial, he was denied access to the union's hiring hall. Local 569 emphasizes that Moore failed to introduce documentary evidence corroborating these damages. But the testimony by Moore and his expert witness, if believed, supports the jury's compensatory damage award of $6,000. Bise v. IBEW, Local 1969, 618 F.2d 1299, 1305 (9th Cir. 1979), cert. denied, 449 U.S. 904 (1980).

Local 569 further contends that the $36,000 in punitive damages award was also excessive. Moore testified that Local 569 repeatedly denied his requests to read the written charges. The jury found that Local 569's "ill will" towards Moore motivated its actions. The jury's finding that Local 569

maliciously violated Moore's LMRDA rights supports the award of punitive damages. Bise, 618 F.2d at 1306.

The record does not support Local 569's contention that the punitive damages award must be reduced because it would seriously impair the union's ability to serve its members.

II. CROSS-APPEAL BY MOORE

A. Motion to Disqualify Counsel and Award of Attorneys' Fees

Moore brought a motion to disqualify Local 569's counsel from representing the individual defendants accused of violating their fiduciary duties under Section 501 of the LMRDA, 29 U.S.C. 501. Finding that Moore had not demonstrated a reasonable likelihood of success on his Section 501 claim, the district court denied Moore's motion and required him to pay the attorney's fees incurred by Local 569 in opposing the motion. Eventually, however, Moore did prevail on this claim. The district court may well have properly reconsidered its award of attorneys' fees if Moore had made the

appropriate timely request. The record reflects that he did not. We find no error in the failure of the court to sua sponte revisit the issue. It was not error to make the award at the time that the court made it.

The district court acted within its discretion when it declined to order the individual defendants to reimburse Local 569 for the pension contributions and the cost of their defense. Union funds should not be used to defend officers against charges that they fraudulently deprived members of their rights or committed offenses that were "'seriously detrimental to the union and its membership.'" Kerr v. Shanks, 466 F.2d 1271, 1277, (9th Cir. 1972) (quoting Milone v. English, 306 F.2d 814, 817 (D.C. Cir. 1962)), cert denied, 412 U.S. 918 (1973). Although Moore contended that some officers were taking a month's worth of benefits for only a week's worth of work, the district court did not find that the local officers acted fraudulently or that the members suffered a serious detriment. In fact, there

was evidence that crediting the officers and staff employees with 48 hours a week of pension contributions put less money in their pension accounts than if they had been credited for the actual hours worked.

B. Claims Against Fischbach and Moore, Inc. and Local 569

Moore claimed that one of his employers, Fischbach and Moore, Inc., had violated the regional collective bargaining agreement by transferring some its employees to a subsidiary without first seeking referrals from Local 569's hiring hall. Moore also alleged that Local 569 breached its duty of fair representation under the LMRA by condoning Fischbach's practices. The district court properly bifurcated Moore's fair representation and breach of contract claims, and correctly dismissed the claim against Fischbach after the jury found for Local 569. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568-72 (1976) (holding that an employee who challenges the finality of an arbitration proceeding must first demonstrate that the union breached its

duty of fair representation before proceeding against an employer for breach of a collective bargaining agreement). Moore was not prejudiced by the district court's exclusion of prejudicial and irrelevant evidence. The record supports the denial of Moore's motions for judgment NOV or a new trial.

C. Claims Against Atkinson Mechanical Contractors, Inc. and Local 569

Moore claimed that another contractor, Atkinson Mechanical Contractors, Inc., breached the regional collective bargaining agreement by wrongfully refusing to hire him. Moore also claimed that Local 569 violated its duty of fair representation by asking Atkinson to reject him.

Atkinson argues that Moore does not have standing to sue it for breaching the collective bargaining agreement. Because Moore was not employed by Atkinson at the time they rejected him, Atkinson contends he was neither a member of the bargaining unit covered by the agreement nor a third party beneficiary to the agreement. In Karo v. San Diego Symphony Orchestra Assoc.,

762 F.2d 819, 821-22 (9th Cir. 1985), a union musician alleged that a symphony had breached a collective bargaining agreement by failing to hold auditions to fill an opening for a percussionist, and that the union breached its duty of fair representation by acquiescing. Because the agreement protected only employees of the symphony, we held that the plaintiff did not have standing to sue the union. Id. And because the terms of the agreement did not indicate the audition procedure was for the benefit of nonemployee union members, we further held that the plaintiff did not have standing as a third party beneficiary to sue the symphony. Id. See also, Sepulveda v. Pacific Maritime Assoc., 878 F.2d 1137, 139-41 (9th Cir.) (finding that longshoremen whom a union did not register as "best qualified" applicants did not have standing to sue either the union or the employer), cert. denied, 493 U.S. 1002 (1989).

Moore had standing to sue Local 569 and Atkinson for alleged improprieties in the

hiring hall referral procedures. Pursuant to the regional collective bargaining agreement, Local 569, unlike the unions in Karo and Sepulveda, operates a hiring hall. In Breininger, the Supreme Court held that a district court had jurisdiction over an unemployed union member's suit which alleged the union breached its duty of fair representation in the administration of a hiring hall. 493 U.S. at 71, 73-85. The Breininger Court was not called upon to decide the issue of jurisdiction over a breach-of-contract suit against an employer. But in discussing Breininger's fair-representation claim, the Court repeatedly stated that it could have been accompanied by a breach-of-contract suit against the employer. Breininger, 493 U.S. at 80-85.

Nevertheless, the district court properly granted summary judgment for Atkinson on Moore's breach-of-contract claim. The agreement allowed an employer to reject an employee, provided the employer did not

discriminate on the basis of union activity or race, sex, and other similar grounds. In rejecting Moore because he was litigious and disruptive, Atkinson did not breach the terms of the agreement. The record also supports the jury's verdict on Moore's fair-representation claim against Local 569. The district court properly denied Moore's motions for judgment NOV or a new trial.

D. Election Claims

Local 569 and the IBEW prohibited Moore from seeking election as a union officer and a delegate at the same time. The district court granted summary judgment dismissing Moore's claim that this policy violated his rights under the LMRDA. We dismiss Moore's claim for lack of subject-matter jurisdiction.

Federal courts lack jurisdiction over a claim that challenges the rules governing the eligibility of candidates for union office. Calhoon v. Harvey, 379 U.S. 134, 138-41 (1964); see also Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986) (stating that

an appellate court always must consider subject-matter jurisdiction). There is an exception allowing for jurisdiction when the plaintiff claims that the union applied its election rules in a discriminatory manner. Kupau v. Yamamoto, 622 F.2d 449, 454 (9th Cir. 1980). There is no evidence that Local 569 and the IBEW applied the eligibility rules unevenly.

Moore also claims that Local 569 and the IBEW committed other violations of the LMRDA during the 1986 election campaign. Moore had previously sought relief for these claims through an action filed with the Department of Labor. The department and Local 569 settled these claims. Another district court approved the settlement. The record supports the court's conclusion that res judicata barred Moore from relitigating.

E. Fiduciary Duty Claims

Moore contends that the district court improperly limited his breach of fiduciary duties claim to the issue of Local 569's

pension contributions on behalf of its officers and staff employees. The district court correctly determined that this was the only breach of fiduciary duty claim included in Moore's complaint that raised a triable issue of fact.

F. Personal Jurisdiction

The district court properly dismissed Moore's claims against J.J. Barry, the president of the IBEW, for lack of personal jurisdiction and correctly denied Moore's motion for default judgment against Barry. After Barry moved to dismiss for lack of personal jurisdiction, Moore bore the burden of coming forward with facts supporting personal jurisdiction. Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). Moore failed to establish that Barry could reasonably have anticipated "being haled into court" in California. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286,297 (1980). "[A] corporate officer who has contact with a forum only with regard to the performance of his official duties is not

subject to personal jurisdiction in that forum." Forsyth v. Overmyer, 576 F.2d 779, 783-84 (9th Cir.) (citing Chem Lab Products, Inc. v. Stepanek, 554 F.2d 371 (9th Cir. 1977)), cert. denied, 439 U.S. 864 (1978). Nothing in the record indicates that Barry conducted any activity on his own behalf in California.

G. Other Claims Against the IBEW

The district court properly dismissed Moore's claims that the IBEW and its officers violated his rights under Title I or Section 609 of the LMRDA. Moore did not present evidence that the IBEW or its officers acted in bad faith, were guilty of fraud, or ratified any of the allegedly wrongful acts of Local 569 "'with full knowledge . . . of an overall scheme to suppress dissent in violation of the LMRDA.'" Moore v. Local Union 569, 989 F.2d 967, 973 (2d Cir. 1987)). The district court also properly concluded that Moore had not presented sufficient evidence to support his claim that the IBEW and its officers breached

the IBEW constitution by, among other things, refusing to approve bylaw amendments proposed by Moore. Stelling, 587 F.2d at 1389 (holding that courts should defer to a union officer's interpretation of a union's constitution unless it is "patently unreasonable"). Furthermore, the district court appropriately denied Moore's motions for judgment NOV or a new trial regarding the jury's finding that the IBEW and its officers did not breach the IBEW Constitution in their handling of Moore's appeals from Local 569's disciplinary hearings. Id.; Landes Constr. Co., 833 F.2d at 1370-71, 72.

H. Jury Instructions

Claiming that the district court's jury instructions were flawed, Moore seeks the reversal of the district court's denial of his motions for judgment NOV and a new trial on a number of issues. Moore failed to object to the jury instructions at trial. Federal Rule of Civil Procedure 51 bars him from raising this issue for the first time in his appeal.

Hammer v. Gross, 932 F.2d 842, 847 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 582 (1991).

I. District Court's Management of the Trial

The district court did not abuse its discretion by limiting the amount of time the parties had to present their cases. Moore did not suffer any prejudice as a result of these limitations. During the trial, the court generously extended the time available to Moore.

J. Building Trades Assessment Claim

Because Moore was never accorded class representative status as to his claims that challenged the increase in the building trades assessment owed by each member of Local 569, the district court correctly declined to order Local 569 to refund the increase to all the members of Local 569. In addition, the district court properly denied his request for a jury trial on this claim. Moore was seeking only declaratory and injunctive relief.

III. AWARD OF ATTORNEYS' FEES TO MOORE

Most of the time during this litigation, Moore proceeded as plaintiff in pro per. Part of the time, though, he was represented by two attorneys. The district court did not abuse its discretion in awarding Moore attorneys' fees. A court may award attorneys' fees to a plaintiff who prevails on claims brought under the LMRA or the LMRDA if the plaintiff's success confers "substantial benefit" on his fellow union members. Hall v. Cole, 412 U.S. 1, 4-9 (1973); Southerland v. International Longshoremen, Local 8, 845 F.2d 796, 798-90 (9th Cir. 1987). A plaintiff who vindicates his rights under the LMRDA may confer substantial benefits on fellow union members even though the court awarded damages only to the individual plaintiff or denied the plaintiff any monetary relief whatsoever. Southerland, 845 F.2d at 799-90. The district court did not commit clear error in finding that Moore had conferred substantial benefits on his fellow union members by successfully pursuing his claims against Local 569. Id. at

799.

We find no abuse of discretion in the amount of attorneys' fees awarded to Moore. The district court made it clear that it had "considered the relationship between the amount of the fee awarded and the results obtained." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Rivera v. City of Riverside, 763 F.2d 1580, 1582 (9th Cir. 1985), aff'd, 477 U.S. 561 (1986). Local 569 contends that the district court failed to comply with the twelve criteria set forth in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1970), cert. denied, 425 U.S. 951 (1976). In its attorneys' fee order, the district court did not explicitly address all twelve of these criteria. Instead the district court focused on the number of hours worked by the attorneys, their hourly fees, and the extent that Moore succeeded on his claims. The Kerr court stated that "[t]he failure to consider [the twelve] factors constitutes an abuse of discretion." Kerr, 526 F.2d at 70. More recently, however, we have relaxed the

standard, and stated that "application of at least some of, or the most relevant, factors may be sufficient for review on appeal." Jordan v. Multnomah County, 815 F.2d 1258, 1263 n. 11 (9th Cir. 1987).1

Finally, the district court properly limited the award of costs and expert witness fees to Moore. He sought costs that were not allowable under 28 U.S.C. 1920. Further, as the court did not appoint his expert witness, it could not award fees in excess of the limit set by 28 U.S.C. 1821 (b). Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987).

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1. "Although we do not sanction the district court's failure to explicitly set forth its consideration of the Kerr factors, we believe that the court's decision, which sets forth a consideration of the most relevant factors, is sufficiently detailed for meaningful review on appeal." Probe v. State Teachers' Retirement System, 780 F.2d 776, 785 (9th Cir.), cert. denied, 476 U.S. 1170 (1986).

AFFIRMED.

No. 94-439

Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

LAWRENCE MOORE,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; PAUL BLACKWOOD; THOMAS PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK, ET AL.; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; J.J. BARRY; S.R. McCANN; RICHARD ROBBINS; ATKINSON MECHANICAL, INC.; FISCHBACK & MOORE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

As to Respondent Atkinson Mechanical Contractors Company, the sole question presented is whether the United States Court of Appeals for the Ninth Circuit properly affirmed the order of the United States District Court, Southern District, California granting Respondent Atkinson's Motion for Summary Judgment as to Petitioner's single claim for relief against said Respondent, to wit, breach of implied or in-fact contract predicated on breach of collective bargaining agreement pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), where: (1) the Ninth Circuit affirmed the district court's finding that said Respondent exercised lawfully its express rights under the agreement; and (2) the National Labor Relations Board possesses exclusive jurisdiction of Petitioner's claim that said Respondent violated Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a).

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to The Rules of the Supreme Court of the United States, Rule 29.1., Respondent Walsh Construction Company, an Operating Division of Guy F. Atkinson Company, a Nevada corporation, as successor to Atkinson Mechanical Contractors Company, hereby states:

Guy F. Atkinson Company, a Nevada corporation, is a wholly owned subsidiary of Guy F. Atkinson Co. of California, a Delaware corporation. Guy F. Atkinson Co. of California is a publicly traded corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARENT COMPANIES AND SUBSIDIARIES ii

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

A. Facts Material to Petitioner's Claim Against Respondent Atkinson 3

1. Petitioner's Misstatements of Fact 6

B. Proceedings Below 10

REASONS WHY THE PETITION SHOULD BE DENIED 11

I. The Petition Improperly Requests This Court To Review Concurrent Findings of Fact by Two Courts Below 11

II. The Petition Does Not Present a Question As to Whether a United States Court of Appeals Has Decided a Federal Question in a Way That Conflicts with Applicable Decisions of This Court 14

III. The Petition Does Not Call for an Exercise of This Court's Power of Supervision 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Breininger v. Sheet Metal Workers International Association Local Union No. 6, 493 U.S. 67 (1989) 15, 16, 17

Furness, Withy & Company v. Yang-Tsze Insurance Association, 242 U.S. 430 (1917) 15

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 12

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 388 (1923) 18

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 17

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 15

Vaca v. Sipes, 366 U.S. 171 (1967)..... 17

STATUTES AND RULES

29 U.S.C. § 157 2

29 U.S.C. § 158(a) 2, 15

29 U.S.C. § 158(b) 16

29 U.S.C. § 185(a) 2

29 U.S.C. § 401 *et seq.* 16

The Rules of the Supreme Court of the United States,

Rule 10..... 1

Rule 10.1.(a)..... 18

Rule 10.1.(c)..... 14

Rule 14.1.(g)..... 3

Rule 15.1..... 6

Rule 29.1..... ii

No. 94-439

In The

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October Term, 1994

LAWRENCE MOORE,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; PAUL BLACKWOOD; THOMAS PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK, ET AL.; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; J.J. BARRY; S.R. McCANN; RICHARD ROBBINS; ATKINSON MECHANICAL, INC.; FISCHBACK & MOORE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The Memorandum of the Ninth Circuit Court of Appeals was filed on June 10, 1994. Petitioner invokes the jurisdiction of this Court under The Rules of the Supreme Court of the United States, Rule 10.

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides, in pertinent part, that suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce may be brought in any district court of the United States having jurisdiction of the parties.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a) provides, in pertinent part, that it shall be an unfair labor practice for an employer: (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 157 of this title; and (2) by discrimination in regard to hire or any term or condition of employment to encourage or discourage membership in any labor organization.

The Respondent, Walsh Construction Company, an Operating Division of Guy F. Atkinson Company, a Nevada corporation, as successor to Atkinson Mechanical Contractors Company (hereinafter "Respondent Atkinson" or "Atkinson"), respectfully requests that this Court deny the Petition for Writ of Certiorari in which Petitioner, Lawrence Moore, seeks review of the Ninth Circuit's Memorandum filed on June 10, 1994 in this case. Said Memorandum is set forth at page 111 of the Supplemental Appendix to the Petition for Writ of Certiorari (hereinafter "Pet. Supp. App.") filed by Petitioner herein.

STATEMENT

The Rules of the Supreme Court of the United States, Rule 14.1.(g) requires that a petition for writ of certiorari contain a concise statement of the case containing the facts material to the consideration of the questions presented. Petitioner's Statement of the Case does not comply with the foregoing mandate. (*See* Petition for Writ of Certiorari filed by Petitioner Lawrence Moore, hereinafter cited as "Pet.," at 2-36.) To assist this Court in the exercise of its discretionary jurisdiction, Respondent Atkinson hereinbelow sets forth the material facts and the proceedings below with citations to the record which pertain to Petitioner's action for breach of collective bargaining agreement against Respondent Atkinson.[1]

A. Facts Material to Petitioner's Claim Against Respondent Atkinson

At times relevant to this action, Respondent Atkinson and Respondent International Brotherhood of Electrical Workers Local 569 (hereinafter "Local 569") were signatories to a collective bargaining agreement, designated Project Construction Labor Agreement (hereinafter "Project Agreement").[2]

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[1] All citations herein to "CD at ___" refer to the civil docket entries by the Clerk of the United States District Court for the Southern District of California in District Court Docket No. CV-87-0172 B(M). A copy thereof was transmitted to the Ninth Circuit Court of Appeals by the Southern District Docket Court Clerk.

[2] Although Petitioner's Second Amended Complaint makes some reference to an "inside agreement" between

The Project Agreement was attached to the initial Complaint filed by Petitioner. (CD at 1.) The Recognition Clause of the Project Agreement provides that the Agreement applies to the "craft *employees* employed on the project" (emphasis added). (CD at 1; Project Agreement, Art. II at 3.) The Project Agreement Management Rights clause further provides at Article VII, subdivision F., "The Employer shall retain the right to reject any applicant referred by the Union." (CD at 1; Project Agreement at 9.) Article XI provides:

> Section 1. The Employer shall have the right to reject *any applicant referred* by the Union. . . .
>
> . . . .
>
> Section 3. In the event referral facilities maintained by the Union are unable to fill the requisition of the Employer . . . within 48 hours . . . the Employer shall be free to obtain workers from any source.

(CD at 1; Project Agreement at 17.)

On October 23, 1986, Billy Wells (hereinafter "Wells"), Atkinson's assistant electrical superintendent, issued a request to the Local 569 hiring hall for the referral of two electricians. (Supplemental Excerpts of Record of Defendant/Appellee Atkinson Mechanical,

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Atkinson and Local 569, the Project Agreement is the only agreement to which Atkinson was signatory on October 24, 1986 with Local 569. Atkinson was not signatory to any "inside agreement." (CD at 267; Declaration of Kent Senior filed with Defendant Atkinson's Motion for Summary Judgment on October 27, 1989 (hearing date: February 12, 1990).) Petitioner has presented no evidence to the contrary.

hereinafter cited "Atkinson SER," filed concurrently with Atkinson's Answering Brief in the Ninth Circuit, Transcript of Deposition of Billy Wells, hereinafter cited as "Wells Dep.," Atkinson SER at 250-51; Wells Dep. at 18-19:1-20.)

On October 24, 1986, Local 569 personnel informed Wells that Petitioner and Walter Whelan had been referred in response to Wells' request. (Atkinson SER at 241, 252; Wells Dep. at 19:13-20, 20:1-3.) Although Petitioner, on appeal and herein, contends that Wells rejected Petitioner's referral for Petitioner's "union-connected activities," (Pet. at 8), the facts before the district court were otherwise.

Wells testified that he was familiar with Petitioner's reputation as litigious and a troublemaker. (Atkinson SER at 257, 277-78; Wells Dep. at 25:10-12, 45:13-25, 46:1-14.) Wells was also familiar with the Project Agreement provision which allowed Atkinson to reject a hiring hall referral for any reason or no reason. (Atkinson SER at 252-53, 263; Wells Dep. at 20:18-25, 21:1-6, 32:23-25, 33:1.) Wells did not wish to accept Petitioner's referral because he believed Petitioner would disrupt his crew. (Atkinson SER at 255, 257; Wells Dep. at 23:14-16, 25.) Wells spoke to the Atkinson foreman under whom Petitioner would be working to obtain his opinion before Wells rejected Petitioner. (Atkinson SER at 255-53, 256, 257; Wells Dep. at 20:21-25, 21:1-6, 24:20-25, 25:1-3.) Wells also conferred with Atkinson's Project Manager, who took the precaution of consulting the Company attorney and confirmed that the Project Agreement authorized him to reject Petitioner's referral with or without cause. (Atkinson SER at 252, 253; Wells Dep. at 20:18-24, 21:1-7.) Wells testified

that he rejected Petitioner as part of his obligation to screen potential employees and pick the best ones he could find to do the job for his employer's advantage. (Atkinson SER at 282; Wells Dep. at 50:1-5.)

After conferring with the Project Manager, Wells telephoned Local 569 personnel, Rick White and Dick Smith, to reject the referral of Petitioner and Whelan but was informed that they had already been dispatched. (Atkinson SER at 259; Wells Dep. at 27:6-23.) When Wells informed the representative of Local 569 that he intended to "turn around" Petitioner and Mr. Whelan, the representative informed Wells that it was "his prerogative." (Atkinson SER at 259; Wells Dep. at 27:15-18.)

1. Petitioner's Misstatements of Fact

Pursuant to The Rules of the Supreme Court of the United States, Rule 15.1., a brief in opposition to a petition for writ of certiorari "should address any misstatements of fact set forth in the petition which have a bearing on the question of what issues would properly be before the court if certiorari were granted." Respondent Atkinson hereinbelow addresses the factual misstatements set forth in the Petition.

As to Respondent Atkinson, Petitioner states that "[h]e sued Atkinson Mechanical Contractors, Inc. . . . and Local 569 officers after they blacklisted him and rejected his acceptance of Atkinson's CBA request for an electrician." (Pet. at 6.) Petitioner's statement is misleading by virtue of Petitioner's use of the pronoun "they." Petitioner's only claim against Respondent Atkinson is for

breach of collective bargaining agreement based on said Respondent's having rejected Petitioner after he was referred to work by Local Union 569's hiring hall on October 24, 1986. Respondent Atkinson did not blacklist Petitioner.

Petitioner states that "Moore's hiring hall referral to Atkinson Mechanical in October, 1986 was rejected despite not working for it before and not knowing supervisor Billy Wells, who admitted rejecting him for protected 'union-connected' activities." (Pet. at 8.) Petitioner's statement that supervisor Wells did not know Petitioner is controverted by Wells' deposition testimony that he had known Petitioner for five or ten years before Wells rejected Petitioner's referral from Local 569 on October 24, 1986. (Atkinson SER at 238; Wells Dep. at 6:3-9.) Petitioner's statement that Wells rejected Petitioner for protected "union-connected" activities is controverted by the entirety of Wells' testimony on this point. In fact, Wells had observed Petitioner engage in what Wells considered to be not only disruptive but illegal conduct when Wells worked with Petitioner. (Atkinson SER at 278; Wells Dep. at 46:2-10.) Moreover, Wells testified that, in his opinion, Petitioner "doesn't give a damn about the 569 or anybody else; he's going to take anyone down he can or he's going to make a mint off of him." (Atkinson SER at 47; Wells Dep. at 47:11-20.)

Petitioner's statement concerning the manner in which Wells was hired by Respondent Atkinson, (Pet. at 8 n.5), is immaterial to Petitioner's claim for breach of collective bargaining agreement.

Petitioner states that "in a deposition Wells acknowledged his sympathetic relationship with Smith and the other Defendants in this case." (Pet. at 8 n.5.) Petitioner's statement misrepresents Wells' testimony that Wells and the individual Defendants herein were not even social friends but merely acquaintances who he might see at a union hall or picnic or with whom he might have "a beer after work." (Atkinson SER at 275-77; Wells Dep. at 43:21-25, 44-45:1-6.)

Petitioner's statement that Smith, White and Wells had several telephone conversations after Petitioner had been dispatched to Respondent Atkinson's jobsite and that Wells said he would reject Petitioner, (Pet. at 9), may imply that Wells' decision to reject Petitioner resulted from such conversations. Any such implication is controverted by Wells' testimony that he telephoned White and Smith and told them that he was going to reject Petitioner's referral. (Atkinson SER at 259; Wells Dep. at 27:8-18.)

Petitioner states that "[a] motion to compel discovery from Atkinson was never acted on [sic]." (Pet. at 17.) Said statement is not only irrelevant to the question herein presented, but, in fact, Respondent Atkinson provided further responses to Petitioner's discovery requests prior to the hearing on Petitioner's Motion to Compel. (Atkinson SER at 169-99.)

Petitioner's statement that "the court said Atkinson breached the CBA by refusal to participate in hearings," (Pet. at 27), is neither supported by any citation to the

record nor material to Petitioner's sole claim that Respondent Atkinson breached the collective bargaining agreement by rejecting his referral.

Petitioner's statement concerning Wells' purported testimony at trial, (Pet. at 30, 31), is immaterial to the question whether the court of appeals properly affirmed the district court's grant of summary judgment in favor of Respondent Atkinson. Further, Petitioner's statement that Wells testified at trial that Wells intended to "knock [Moore] on his butt," (Pet. at 30), appears to be an excerpt from Wells' deposition testimony. In that regard, Wells testified that *after* October 24, 1986, he had encountered Petitioner at the union hall in San Diego and at Local 357 on two to four occasions wherein Petitioner "began to get on [Wells'] case about another matter" and, on one occasion, Wells had told Petitioner "to get off my back or [Wells] was going to take him out which meant [Wells] was going to knock him on his butt." (Atkinson SER at 265-66; Wells Dep. at 33:16-25, 34:1-13.)

In short, Petitioner's effort to cast Wells in a Machiavellian role is not supported by the record. Based on Wells' personal observation of Petitioner and Petitioner's reputation, Wells held the opinion that Petitioner's conduct was disruptive, unlawful, and motivated solely by self-interest. Based on his opinion and without union encouragement, Wells decided to reject Petitioner's hiring hall referral and did so after confirming that the Project Agreement permitted such rejection. Thus, contrary to Petitioner's Statement of Facts, the record establishes neither breach of collective bargaining agreement nor violation of Petitioner's rights to engage in protected, concerted activity.

B. Proceedings Below

Petitioner's Second Amended Complaint, filed on December 21, 1988, alleged a single cause of action against Respondent Atkinson: a Fifth Cause of Action for breach of implied or in-fact contract under the rubric of "Discriminatory Dispatching." (CD at 107; Second Amended Complaint at 13:7-28, 14:1-10.)

On October 30, 1989, Respondent Atkinson filed a Notice of Motion and Motion for Summary Judgment or Alternatively for Summary Adjudication of Issues and accompanying papers. (CD at 204, 263, 265, 266, 267.) Thereafter, Petitioner separately served Opposition papers to Atkinson's Motion for Summary Judgment, (CD at 284, 285, 286); Respondent Atkinson filed its papers in reply to Petitioner's separate opposition papers, (CD at 294, 295, 296); and Petitioner filed a Supplemental Declaration in Opposition to Atkinson's Motion for Summary Judgment. (CD at 301.)

The district court's Order Granting Atkinson Mechanical's Motion for Summary Judgment was filed on May 10, 1990, and entered. (CD at 317; Pet. Supp. App. at 3-4.)

On May 11, 1990, the separate Judgment in a Civil Case which ordered and adjudged that Atkinson Mechanical's Motion for Summary Judgment as to the allegations of Petitioner's Fifth Cause of Action in the Second Amended Complaint be granted was signed, entered and copies thereof mailed. (CD at 318; Judgment in a Civil Case, Case No. 87-0172 B(M).)

Notwithstanding the district court's instruction to Petitioner at the summary judgment hearing on April 16, 1990, that the court's order granting summary judgment was a final order as to Atkinson and immediately appealable and, further, that Petitioner must file a timely appeal therefrom to protect any rights he might have to appeal, Petitioner took no action to appeal said order until he filed an appeal to the Ninth Circuit on April 17, 1992.

On November 2, 1992, Respondent Atkinson filed in the Ninth Circuit a Motion to Dismiss Plaintiff/Petitioner's appeal as untimely. By Orders dated November 27 and December 23, 1992, the Ninth Circuit denied Respondent's said motion.

By Memorandum filed June 10, 1994, the Ninth Circuit affirmed the district court's grant of summary judgment for Respondent Atkinson on Petitioner's breach of contract claim. The Ninth Circuit found that the Project Agreement "allowed an employer to reject an employee, provided the employer did not discriminate on the basis of union activity. . . . In rejecting Petitioner because he was litigious and disruptive, Atkinson did not breach the terms of the Agreement." (Pet. Supp. App. at 125-26.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition Improperly Requests This Court To Review Concurrent Findings of Fact by Two Courts Below

"A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot

undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). As to Respondent Atkinson, the sole task which Petitioner would have this Court undertake is a review of concurrent findings of fact by two courts below, in which findings Petitioner demonstrates no error at all.

In its Memorandum opinion herein, the Ninth Circuit addressed Petitioner's claim that Respondent Atkinson "breached the regional collective bargaining agreement by refusing to hire him."[3] (Pet. Supp. App. at 123.) The Ninth Circuit concurred with the district court's grant of summary judgment on the factual ground that the collective bargaining agreement which formed the predicate for Petitioner's breach of contract claim against Atkinson "allowed an employer to reject an employee, provided the employer did not discriminate on the basis of union activity. . . . " (Pet. Supp. App. at 125-26.) The Ninth Circuit further concurred with the district court's factual

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[3] As to Respondent Atkinson, Petitioner poses for review the question "[c]an the union business manager (who was once the defense contractor's supervisor and is one of the racketeers) and another contractor's supervisor collude to reject/blacklist a member properly referred through the CBA job referral procedure in order to punish him for protected union activities (suing the union and officers, and running for union office)?" (Pet. at i.) As evidenced by the facts hereinabove set forth in Respondent's Statement, the question as posed by Petitioner lacks any support in the record below and, for that reason, must be disregarded as presenting an improper question for review.

finding that, "[i]n rejecting Moore because he was litigious and disruptive, Atkinson did not breach the terms of the Agreement." (Pet. Supp. App. at 126.)

The express language of the Project Agreement which governed hiring hall referrals herein establishes the propriety of the Ninth Circuit's concurrence with the district court's factual finding that the collective bargaining agreement allowed an employer to reject an employee on nondiscriminatory grounds. (*See* CD at 1; Project Agreement at 3, 9, 17.) Thus, Petitioner cannot show error in the Ninth Circuit's concurrence with the district court that the Project Agreement gave Respondent Atkinson the right to reject Petitioner's referral. Accordingly, Petitioner cannot establish a viable basis for review by this Court on this point.

Similarly, that the Ninth Circuit concurred with the district court's factual finding that Respondent Atkinson's reasons for Petitioner's rejection did not breach the collective bargaining agreement does not constitute a proper subject of review on writ of certiorari. In that regard, Petitioner's assertion that "[t]here was no evidence that Petitioner was 'disruptive' when Atkinson was granted summary judgment . . . ," (Pet. at 47), posits only an evidentiary question which would require this Court to review the record to determine whether sufficient evidence existed for the district court's conclusion that Respondent Atkinson rejected Petitioner's referral for reasons allowed by the collective bargaining agreement. Moreover, as set forth in the recitation of facts herein, the record is replete with evidence which was before the district court that Petitioner's conduct was, *inter alia*, disruptive on the job. In view of the Ninth Circuit's

express concurrence with the district court's factual finding that Petitioner was rejected for reasons allowed by the collective bargaining agreement, review thereof is precluded by this Court's historic refusal to review concurrent findings of fact by two courts below.

Petitioner not only fails to make the requisite showing of obvious and exceptional error, but fails to show any error at all in the Ninth Circuit's concurrence with the factual findings on which the district court granted summary judgment as to Petitioner's claim of breach of collective bargaining agreement against Respondent Atkinson. Thus, this Court should deny the instant Petition for Writ of Certiorari.

II. The Petition Does Not Present a Question As to Whether a United States Court of Appeals Has Decided a Federal Question in a Way That Conflicts with Applicable Decisions of This Court

The Rules of the United States Supreme Court, Rule 10.1.(c) includes as a reason for granting a writ of certiorari that "a United States court of appeals . . . has decided a federal question in a way that conflicts with applicable decisions of this Court." Petitioner asserts that refusal to permit his breach of contract action to be litigated against Respondent Atkinson conflicts with decisions of this Court. (Pet. at v, 42.)

Preliminarily, Respondent Atkinson brings to this Court's attention that Petitioner's commingling of his argument concerning his action for breach of collective bargaining agreement against Respondent Atkinson with his action for breach of duty of fair representation against

Respondents "Union Defendants" not only obscures the question presented as to Respondent Atkinson but exhibits a disregard for this Court's admonition that petitions be "carefully prepared, contain *appropriate* references to the record, and present with *studied accuracy*, brevity and clearness whatever is essential to ready and accurate understanding of points requiring [this Court's] attention. . . . " *Furness, Withy & Company v. Yang-Tsze Insurance Association*, 242 U.S. 430, 434 (1917) (emphasis in original). Specifically, Petitioner's citations to numerous decisions of the National Labor Relations Board ("NLRB") in connection with unfair labor practice charges, (Pet. at 43-45, 47-48), are inapposite to Petitioner's claim against Respondent Atkinson for breach of collective bargaining agreement under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

Petitioner blatantly misrepresents to this Court that Petitioner may base his claim of breach of collective bargaining agreement against Respondent Atkinson under Section 301 on a claim that Respondent Atkinson committed an unfair labor practice under Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a). (*See* Pet. at 43-47 (e.g., "both Atkinson and Local 569 officers committed an unfair labor practice" (Pet. at 46).) In that regard, the sole decision of this Court cited by Petitioner which even discusses Section 301, *Breininger v. Sheet Metal Workers International Association Local Union No. 6*, 493 U.S. 67 (1989), does not so hold.

Petitioner cites *Breininger* for the erroneous proposition that "[f]ederal courts have concurrent jurisdiction with the NLRB over breaches of a union's duty of fair representation in the administration of a hiring hall and

an accompanying suit against a contractor for breach of contract." (Pet. at 42.) Petitioner's error is found in the fact that *Breininger* merely holds that federal courts have concurrent jurisdiction with the NLRB over an unfair labor practice charge *against a union* when such charge also might constitute a claim of breach of the union's duty of fair representation. *Breininger*, 493 U.S. at 75. *Breininger* neither addressed whether nor held that federal courts have concurrent jurisdiction with the NLRB over an employee's *claim for breach of collective bargaining agreement against an employer under Section 301 of the Labor Management Relations Act*. Further, *Breininger* neither addressed whether nor held that federal courts have concurrent jurisdiction with the NLRB over an employee's *unfair labor practice charge against an employer under Section 8(a) of the National Labor Relations Act*.

In *Breininger*, this Court addressed, in pertinent portion, whether the NLRB has exclusive jurisdiction over a claim that a union both breached its duty of fair representation and violated the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* by discriminating in union hiring hall referrals. *Breininger*, 493 U.S. at 70. This Court held that federal court jurisdiction exists over a fair representation claim *against the union*, irrespective of whether such claim arose out of the operation of union hiring halls so as to constitute an unfair labor practice charge against a union under Section 8(b) of the National Labor Relations Act, 29 U.S.C. § 158(b). *Id.* at 74-75. In so holding, this Court iterated the general principle that "neither state nor federal courts possess jurisdiction over claims based on activity that is "arguably" subject to §§ 7 or 8 of the NLRA." *Breininger*, 493 U.S. at

74 (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)). Nevertheless, based on the rationale and holding in *Vaca v. Sipes*, 366 U.S. 171, 177 (1967) "that *Garmon*'s pre-emption rule does not extend to suits [against a union] alleging a breach of the duty of fair representation[,]" this Court concluded "[t]hat a breach of the duty of fair representation might also be an unfair labor practice is thus not enough to deprive a federal court of jurisdiction over the fair representation claim." *Breininger*, 493 U.S. at 74-75.

Accordingly, *Breininger* does not stand, as Petitioner implies, for the proposition that the *Vaca* fair representation exception to *Garmon*'s preemption rule operates to extinguish the NLRB's exclusive jurisdiction over an unfair labor practice brought pursuant to Section 8(a) of the National Labor Relations Act against an employer. Further, Petitioner has not cited and cannot cite any decisions of this Court which would oust the NLRB of exclusive jurisdiction over Petitioner's claim under Section 8(a) that Respondent Atkinson committed an unfair labor practice when it rejected Petitioner's hiring hall referral so as to permit the district court to consider such claim in connection with Petitioner's Section 301 claim for breach of collective bargaining agreement.

As demonstrated, Petitioner offers no decision of this Court which conflicts with the Ninth Circuit's conclusion that the district court properly adjudicated Petitioner's Section 301 breach of collective bargaining agreement claim against Respondent Atkinson. Thus, Petitioner again fails to provide a reason which would warrant review by this Court and writ of certiorari should be denied.

III. The Petition Does Not Call for an Exercise of This Court's Power of Supervision

The Rules of the Supreme Court of the United States, Rule 10.1.(a) includes as a reason for grant of certiorari that "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Petitioner asserts "[t]he Appeals Court's affirmation of unfair labor practices by holding the employer could reject under the CBA if he didn't discriminate on the basis of 'union activity-or race or sex' . . . overstepped the boundaries of accepted procedure to sanction lower court departure from the usual course of judicial proceedings so as to require exercise of this Court's power of supervision." (Pet. at 48.)

As demonstrated herein, Petitioner's invocation of this Court's power of supervision is rendered nugatory by the absence from the record below of any indication that the Ninth Circuit departed in any manner from the usual course of judicial proceedings or sanctioned such departure by a lower court by affirming the district court's grant of summary judgment in favor of Respondent Atkinson on the grounds stated in the Ninth Circuit's Memorandum.

This Court has emphasized that it will not grant a writ of certiorari "except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties. . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 388, 393 (1923). As to

Respondent Atkinson, Petitioner's request for review amounts to no more than an impermissible request that this Court review concurrent findings of fact by two courts below as to Petitioner's claim that Atkinson breached the collective bargaining agreement. Hence, as to Respondent Atkinson, Petitioner's case presents neither any issue of public importance nor any special and important reason for review by this Court and Petitioner's request for review on writ of certiorari should be denied.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

DATED: October 11, 1994

Respectfully submitted,

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CASE NO. 94-439

THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1994

LAWRENCE MOORE,

PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; PAUL BLACKWOOD; THOMAS PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK, et al; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; J.J. BARRY; S.R. McCANN; RICHARD ROBBINS; ATKINSON MECHANICAL, INC.; FISCHBACH & MOORE, INC.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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14 pp

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES ii

STATEMENT OF JURISDICTION 1

MISSTATEMENTS OF FACT IN OPPOSITION 1

MISSTATEMENTS OF LAW IN OPPOSITION 9

ARGUMENT 10

I. The Court should grant the Petition to resolve whether Atkinson and the Unions could collude against third party beneficiaries in negotiation and administration of a collective bargaining agreement and throughout proceedings in the district court, and to review the district court's refusal to permit discovery in this case and limit cross-examination of the only Atkinson and Union witness at trial, to review district court refusal to permit any rebuttal case, and to review the Court of Appeals' refusal to address those issues.

TABLE OF AUTHORITIES

page

Duncan v. Peninsula Shipbuilders Ass'n, 394 F.2d 237 (4th Cir. 1968) 10

Wooddell v. IBEW Local No. 71, ___ U.S. ___, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991) 11

STATEMENT OF JURISDICTION.

Jurisdiction was proper in the district court under 28 U.S.C. §§ 1331, 1337, and 1343. Appellate jurisdiction was proper under 28 U.S.C. § 1291. This Court has jurisdiction to hear this matter pursuant to 29 U.S.C. § 1254 (1) and Rule 10 of the Supreme Court Rules.

MISSTATEMENTS OF FACT IN OPPOSITION

Respondent Atkinson Mechanical Contractors Company (hereinafter "Atkinson") ostensibly set forth material facts, but did so by eight pages of misstatements which cited to the record in the district court. No other parties opposed the Petition. Plaintiff uses Atkinson's citing methods to point out and address misstatements as briefly as possible below.1/

Defendants' Project Agreement specifically incorporated the job referral procedure which is created by the Inside collective bargaining

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1/. Defendant's attorneys have the distinction of presently being the most often-sanctioned law firm in the Ninth Circuit.

Agreement between Local 569 and other signatory electrical contractors and authorizes Local 569 to administer the hiring hall job referrals.2/

The referral procedure preamble stated:

> In the interest of maintaining an efficient system of production in the industry, providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interests of the employees in their employment status within the area and of eliminating discrimination in employment because of membership or non-membership in the Union, the parties hereto agree to the following system of referral of applicants for employment.

Atkinson superintendent Wells, who rejected Plaintiff's referral in response to its request for an electrician, didn't reject the Plaintiff because he was litigious or disruptive or ever

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2/. The Project Agreement (at CD 267) stated, "The Employer . . . shall . . . be bound by the registration facilities and referral systems established by the unions signatory hereto . . .." Plaintiff's reply brief on appeal cited to the district court's trial ruling that Atkinson was bound by the Inside Agreement procedure and ruled Atkinson's contrary argument, raised here again frivolously, "was wrong," and held it had breached its "lawful duty" by not participating in the referral procedure oversight committee hearings (see the transcript of the trial on August 16, 1991 (Volume XV), at pp. 28-41).

use those terms (used only to beg the question the collective bargaining agreement ("CBA") was not violated by denying its benefits to a third party beneficiary Plaintiff). Atkinson's Brief stated its Project Manager and Company attorney both advised Wells he could reject Petitioner's referral with or without cause.

Whether Plaintiff was litigious, if proved, could be remedied at law and *ad hominem* attacks that he was motivated "solely by self-interest" illustrate that Defendants had no real defense.

Atkinson attempted to create the illusion that Superintendent Wells was a normal part of its management team and had his own management reasons for rejecting Plaintiff, but the record is clear that Wells was recommended to Atkinson by Local 569's business manager Dick Smith, and sympathized with ostracizing Plaintiff for his political and legal opposition to the Union's officers. Atkinson fired Wells shortly after.

After Wells showed hostility at trial while being questioned on his inconsistent deposition statements (angrily admitting he intended "to

knock [Plaintiff] on his butt") the trial judge interrupted cross-examination and also refused to permit Plaintiff to bring on any rebuttal of Wells' thoroughly unreliable testimony.3/

Defendant's claims of Wells' confidence in its right to reject Plaintiff is belied by the attempts to justify Wells' breach of contract.

Nor is the fact that Wells confirmed his right to reject Plaintiff with the "Project Manager" and the "Company attorney" dispositive of whether Atkinson had such a right under the collective bargaining agreement to collude via its servant Wells with the Union Defendants to blacklist Plaintiff because he sued them.

Defendant also stated that the decision to reject Plaintiff was not made in collusion with

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3/. Defendant attempted to downplay the trial judge's stoppage of cross-examination on Wells' deposition statements after frustration caused him to admit he intended "to knock [Plaintiff] on his butt," and misrepresented the statement was "an excerpt from his deposition testimony."

But that trial testimony was clearly cited on appeal (transcript of July 31, 1993, Volume IX, pp. 136-162 -- where Wells had also defined a troublemaker as a person who sues the union). Further, Wells' deposition testimony admitted he also threatened "to take [Plaintiff] out."

the union because Wells called Smith and White and told them he was going to reject Plaintiff. But that is also not true. Wells testified at his Deposition that after Smith informed him of Plaintiff's referral to the Atkinson job,

> "I didn't say much of anything. I hung up the phone; I thought about it; discussed it with my foremen; I went to [the Project Manager] and asked him if I could make the turn around, and he says, yes."

He stated that when he called Smith later and told him he would reject Plaintiff, he was reassured it was his "prerogative." (Atkinson SER at 252-259; Wells Dep. at 20-27).4/

White denied that Wells ever called him or that he even knew Plaintiff had been rejected,

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4/. The jury awarded damages to Plaintiff for Smith's other abuses of his Union office to ensure Plaintiff could not work by removing him from the out of work list and also derogating his employment status from out-of-list priority Group One to Group Two (*Supp. Appendix* at 114).

Smith was formerly a high-level supervisor with defense contractor Fischbach & Moore, Inc. which evaded Federal debarments by racketeering with Local 569 and Internat'l IBEW officers to defraud the Government of hundreds of millions of dollars by transferring employees to puppet corporations. Wells was also a transferee and Smith later recommended him to Atkinson for the superintendent position.

testified he knew Plaintiff for twenty years, and Plaintiff was a foreman and lead hand who always did a good job (trial transcript on August 14, 1991, Volume XIII, pp. 116, 126).

Atkinson superintendent Wells' deposition statements that he knew Plaintiff for five or ten years as a "troublemaker" and discussed him with two foremen (who denied those discussions) to decide that he would "disrupt his crew" were controverted by Plaintiff's two declarations in opposition to a summary judgment motion, one of which was an F.R.Civ.P. 56(f) declaration (CD 284-285, 301) that discovery was not complete.

The issues of fact created by declarations and Wells' Deposition should have been resolved by the jury, but summary judgment was granted to Atkinson before discovery was completed and while a motion to compel discovery was pending.

Defendant also misrepresented that Smith's recommendation of Wells as superintendent for Atkinson "is immaterial" to the claim that it breached the collective bargaining agreement, but Local 569 officer Smith's breach of duty of

fair representation by an unfair labor practice (collusion with Atkinson superintendent Wells to reject Plaintiff from employment) makes a case against Atkinson for breach of contract.

Atkinson stated Petitioner misrepresented Wells' relationship with the Union Defendants. But Wells testified in his Deposition he had talked to people named in the caption of the case about Plaintiff on "various occasions" and none of them were "too fond of" the Plaintiff, specifically naming Smith. (Atkinson SER at 276, 280; Wells Depo. at 44:19 -25, 48:9-22).

Wells' deposition was also replete with his statements of resentment at Plaintiff's running for Union office ("he's a glory seeker"), and passing out papers at election time (Atkinson SER 277-79; Wells Depo. at 45-47).

Wells stated Plaintiff was turned around with "no reason," but told another electrician at the deposition he should not associate with Plaintiff if he wanted to benefit from being a Union member and have jobs, because he is suing the people that provide the jobs. (Atkinson SER

at 265, 278-79, 303; Wells Depo 33, 46-47, 71).

Contrary to Atkinson's misstatements in its Reasons Why the Petition Should be Denied (and after its eight pages of misstatements of fact) that this court cannot undertake to review the findings of fact of the "two courts below," the two courts made absolutely no findings of fact. The Ninth Circuit gratuitously stated Plaintiff is litigious and disruptive to beg the question Atkinson was allowed to reject, provided it did not do so on the basis of his "union activity." (*Supplemental Appendix* to *Petition for Writ of Certiorari*, at pp. 3, 125-26).

Nor did the Ninth Circuit comment on the district court's abuse of Plaintiff's right to cross-examine Wells on his testimony, or on its refusal to permit Plaintiff to do any rebuttal case to Wells' trial testimony for Local 569.5/

5/. The Ninth Circuit also ignored Plaintiff's appeal on grounds that Atkinson conspired with Local 569 to interfere with his protected right to sue the Union, and would not acknowledge his appeal on grounds the district court would not permit him to fully cross-examine Wells or to present a case on rebuttal that contradicted Wells' entire testimony on Local 569's behalf.

MISSTATEMENTS OF LAW IN OPPOSITION

Contrary to Atkinson's misstatement of law, "express language of the Project Agreement" may not allow "an employer to reject an employee on nondiscriminatory grounds" where that employer has breached the contract by helping the Union to breach its duty of fair representation. To hold otherwise would fly in the face of public policy and legitimize such CBAs as contracts of adhesion for employees.

Clearly, Atkinson hired Wells and approved Plaintiff's rejection to strengthen congenial relations with the Union, to persuade it of its good will, and assist the Union in disciplining him for suing it and opposing Union policies. (*Petition for Writ of Certiorari*, pp. 42-49).

"Commingling" of facts in this hybrid 301 cause of action does not obscure the question, but illuminates the awful history of Union and employer collusion to violate the CBA rights of third party beneficiaries. N.L.R.B. decisions were cited to show the history and true purpose of CBA hiring hall provisions approved by this

Court, including a "right to reject" to counter Union favoritism, and show decisions that abuse of CBAs shown here may be remedied at law.

Plaintiff does not base his claim of breach of the CBA against Atkinson on its unfair labor practice. Atkinson was sued for breach of the CBA contract, and Union abuse of the CBA right to reject to discipline dissident members is a breach of its fair representation duty (such a breach necessarily required Atkinson to comply with rejection and breach the contract).

ARGUMENT

Atkinson, the International Brotherhood of Electrical Workers and Local 569 entered into a collusive arrangement from the start of their relationship to pretend to bargain collectively on behalf of third party beneficiaries.6/

Atkinson hired superintendent Wells on the

6/. The contract was negotiated by a "Building and Construction Trades Council" which was not an exclusive representative chosen by any Union bargaining unit (see *Supp. Appendix*, at pp. 26-27, n.3) and both the IBEW and Local 569 signed it without any approval by the bargaining unit.

recommendation of Local 569's business manager Smith, not for any legitimate business reason, but to ensure that Smith could manipulate and control, to their mutual advantage, bargaining unit members. Those three colluded to deny the third party beneficiary Plaintiff the benefits of the contract ostensibly negotiated for him.

Unfortunately, after Plaintiff was rejected Atkinson realized Wells was a loose cannon and that Smith had used Atkinson to illegally deny Plaintiff income he needed to support his legal and political opposition to Union policies, but that does not excuse its breach of contract.7/

The rejection retaliated against Plaintiff for exercising protected rights to sue, and the Union is also liable under LMRDA § 101(a)(4), and Atkinson is liable for tortious, collusive conduct. *Duncan v. Peninsula Shipbuilders*

7/. Smith colluded with Atkinson servant Wells to reject Plaintiff in violation of his duty to fairly represent Plaintiff, by breaching both the Union's constitution and referral procedure (see *Wooddell v. IBEW Local No. 71*, 112 S.Ct. 494 (1991)), and by violating Sec. 101(a)(4) of the Labor Management Reporting and Disclosure Act (29 U.S.C. 411).

Ass'n, 394 F.2d 237 (4th Cir. 1968).

It is obvious that Plaintiff is a victim of collusion between Atkinson and the Unions, not only to deny him the benefits of an ostensible collective bargaining agreement, but to abuse the misguided attempts of the courts to create a "national labor policy" which does not permit third party beneficiaries of CBAs to check and balance colluding parties effectively, and to create an even more nebulous "industrial peace" which flies in the face of Congessional stated intent to protect the rights of workers to the extent that ordinary citizens are protected.

District court refusal to permit the cross-examination of Atkinson servant Wells, refusal to permit rebuttal of Wells' testimony, and its prejudicial jury instructions, and the Circuit Court's ratification of those acts, beg for the exercise of this Court's supervision power.

This Petition for Writ of Certiorari should be granted.

Dated: 10-20-1994 Lawrence Moore

Lawrence Moore